TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 534

LOUIS JOSEPH ABBATE AND MICHAEL LOUIS FALCONE, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1957

CERTIORARI GRANTED DECEMBER 16, 1957

Supreme Court of the United States

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INDEX

	Original	Print
Record from the United States District Court for the Southern District of Mississippi	2	2
Indictment	2	2
Motion of James Shelby and Charles G. Perry for severance	7	5
Affidavit	7	5
Indictment in Criminal Court of Cook County, Illinois	11	8
Transcript of testimony	23	15
Excerpts from testimony of Frank Furlic, direct	730	15
Motion for mistrial and denial thereof	739	21
Application for probation on behalf of Falcone and Abbate	1096	32
Jury verdict	1116	33
Sentence of Abbate	1124	34
Sentence of Falcone	1126	36

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	Original	Print
Proceedings in the United States Court of Appeals for the Fifth Circuit	1190	38
Opinion, Rives, J.	1190	38
Judgment	1198	44
Minute entry of order denying rehearing	1221	44
Clerk's certificate (omitted in printing)	1225	44
Order allowing certiorari	1226	45

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2697

UNITED STATES OF AMERICA

v.

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY, alias Robert Perry, JAMES SHELBY.

INDICTMENT—Filed January 23, 1956

The Grand Jury Charges:

That commencing on or about April 1, 1955, and continuing thereafter to on or about May 12, 1955, in the Jackson Division of the Southern District of Mississippi, within the jurisdiction of this Court, and in divers other places within the United States,

Louis Joseph Abbate,
Michael Louis Falcone,
Charles G. Perry, alias Robert Perry,
and James Shelby,

defendants herein, did knowingly, wilfully, unlawfully and feloniously combine, conspire, confederate, and agree together and with each other and with

Norman D. McLeod, alias John Morton, who is named as co-conspirator, but not as defendant hereinafter set [fol. 3] forth.

The aforesaid defendants and their co-conspirators conspired and agreed that they would wilfully and maliciously injure and destroy and wilfully and maliciously cause to be injured and destroyed certain works, property and material known as coaxial repeater stations and micro-wave

towers (hereinafter called "installations"), which were located in the States of Mississippi, Tennessee and Louisiana, and which were essential and integral parts of systems and means of communication operated and controlled by the United States.

That it was further agreed that the defendants and their co-conspirators would wilfully and maliciously interfere in the use and working of communication systems operated and controlled by the United States by damaging same.

That it was further agreed that the defendants and their co-conspirators would wilfully and maliciously obstruct, hinder, and delay the transmission of communications over communication systems operated and controlled by the United States.

That it was a further part of the said agreement that said conspiracy would be accomplished in the following manner, to-wit: It was a part of said scheme and plan that certain of the co-conspirators familiar with and skilled [fol. 4] in the use of dynamite would go to the State of Mississippi and to other States in which the said installations were located for the purpose and with the intention of injuring and destroying the said installations by dynemite. (sic)

It was a further part of said scheme and plan that one of the aforesaid co-conspirators would obtain dynamite, fuses, caps, and other materials in the State of Illinois and to transport and carry the same into the State of Mississippi.

That it was a further part of the said scheme and plan that maps and plans showing the locations of the said installations and the roads giving access thereto would be prepared and delivered to the co-conspirators who agreed to injure and destroy the said installations by the use of dynamite.

That it was a further part of the said scheme and plan that the co-conspirator who undertook to destroy the said installations by dynamite would be directed to the exact location of each of the installations which were to be destroyed by the use of dynamite.

The Grand Jury further charges that the said defendants and co-conspirators, in furtherance of and for the purpose of carrying into execution the said combination, conspiracy, confederation, and agreement, did and performed the following overt acts:

[fol. 5] OVERT ACTS

1. On or about April 19, 1955, at Chicago, Illinois the defendant James Shelby met and conferred with Louis Joseph Abbate, Michael Louis Falcone and Norman D. McLeod, alias John Morton.

2. On or about April 19, 1955, at Chicago, Illinois, the defendant James Shelby delivered to Louis Joseph Abbate, Michael Louis Falcone, and Norman D. McLeod, alias John Morton, three large manila envelopes containing maps and plans showing the locations and certain coaxial repeater stations and micro-wave towers in the States of Tennessee, Louisiana and Mississippi.

3. On or about April 21, 1955 Norman D. McLeod, alias John Morton, traveled from Chicago, Illinois to Jackson, Mississippi, and carried with him suitcases containing dynamite, fuses, caps, and other materials suitable and designed for use as explorers.

4. On or about April 22, 1955 James Shelby checked into the Edwards Hotel, Jackson, Mississippi.

5. On or about April 22, 1955, at Jackson, Mississippi, the defendants, James Shelby and Charles G. Perry, met and conferred with Norman D. McLeod, alias John Morton.

6. On or about April 22, 1955 Charles G. Perry drove Norman D. McLeod, alias John Morton, from Jackson, [fol. 6] Mississippi into Rankin County, Mississippi for the purpose of locating and inspecting installations to be dynamited.

7. On or about April 22, 1955 James Shelby met Norman D. McLeod, alias John Mornton, (sic) and drove McLeod North on U. S. Highway 51 into Madison County, Mississippi to point out installations to be dynamited.

8. On or about April 23, 1955 Charles G. Perry drove Norman D. McLeod, alias John Morton, in and around Jackson, Mississippi.

9. On or about April 25, 1955, at Chicago, Illinois, Louis Joseph Abbate and Michael Louis Falcone caused to be typed copies of maps and plans showing locations of installations in Mississippi, Tennessee and Louisiana.

10. On or about April 28, 1955, on U. S. Highway 49, about 23 miles South of Jackson, Mississippi, in Simpson County, Mississippi, an explosion damaged a repeater station containing a coaxial cable which was an essential and intergral (sic) part of a system and means of communication operated and controlled by the United States.

All in violation of Section 371, and 1362 Title 18, United States Code, and against the peace and dignity of the United States.

/s/ Robert E. Hauberg, United States Attorney.

[fol. 7] A True Bill:

/s/ S. H. McDonieal, Foreman of the Grand Jury.

IN UNITED STATES DISTRICT COURT

MOTION OF JAMES SHELBY AND CHARLES G. PERRY FOR SEVERANCE—Filed May 8, 1956

Come the defendants, James Shelby and Charles G. Perry, ~~respectively, in criminal action #2697 now pending~~ the above entitled case, for the reasons set forth in the subjoined affidavit.

/s/ Quitman Ross, Attorney for James Shelby, /s/ Frank F. Mize, Attorney for Charles G. Perry.

State of Mississippi
Hinds County

Quitman Ross and Frank F. Mize, each being duly sworn, say:

and demand that they be given a separate trial in

That they are counsel for James Shelby and Charles G. Perry, respectively, in criminal action #2697 now pending on the docket of this court, wherein they are jointly indicted with Louis Joseph Abbate and Michael Louis Falcone for conspiracy to violate Section 1362 of Title 18, United States [fol. 8] Code.

That prior hereto, and in May of 1955, the said defendant, James Shelby was jointly indicted in the Criminal Court of Cook County, Illinois, with Norman Douglas McLeod, alias Nelson Garbitt Gifford, alias Nelson Barburr Glifford, alias John Morton, and two of his co-defendants in this case, namely Louis Joseph Abbate and Michael Louis Falcone, based upon the identical facts of this case and being an identical offense except that it was a state court proceeding as shown by a certified copy of the indictment in said case, hereto annexed and made a part hereof.

Thereafter on August 15, 1955, the said co-defendants, Louis Joseph Abbate and Michael Falcone entered their separate pleas of guilty to said indictment and were thereupon sentenced to serve terms of imprisonment for their said offense as shown by certified copies of judgments of the Criminal Court of Cook County, Illinois hereto annexed and made a part hereof.

The defendant, James Shelby pleaded not guilty to said indictment and there was on January 16, 1956, an effective judgment of acquittal as to the said defendant, James Shelby, in that the indictment against him was dismissed and the defendant ordered hence without day, which said order of dismissal is, under Illinois law, res judicata [fol. 9] as to him. A certified copy of said order of dismissal is annexed hereto and made a part hereof.

Affiants are advised and so believe that there are elaborate and lengthy written statements in the nature of confessions made by the said co-defendants Michael Falcone and Louis Joseph Abbate in which they admit the allegations of the indictment in this case and the indictment in the Criminal Court of Cook County, Illinois, and at the same time incriminate and implicate the defendant James Shelby. These statements are verily believed to be accessible to or in possession of counsels for the government and are to be used or sought to be used against the two defendants mak-

ing them. These statements or confessions inseparably link the defendant James Shelby with the actions of the defendants Falcone and Abbate.

The defendants Shelby and Perry are both men of good name, fame and reputation, in that they have never heretofore been charged with or convicted for any offense whatever and have, in this case, from the very beginning denied their guilt and asserted their innocence whereas the said two co-defendants have each pleaded guilty to identical facts charged in this indictment and in addition thereto, the defendant Michael Falcone has been heretofore indicted and convicted for robbery in the Criminal Court of Cook [fol. 10] County, Illinois, as shown by a certified copy of the indictment and other proceedings had therein in General Number 49-866 of the records of the Criminal Court of said Cook County, Illinois, annexed and made a part thereof.

Affiants verily believe that the ends of Justice demand a severance and separate trial for these two defendants and that to force them to trial jointly with the defendants Falcone and Abbate would saddle them with an unbearable, unwarranted and unfair burden, and they would thereby prejudiced. (sic)

Counsel respectfully request to briefly elaborate orally on this motion and subjoined at the convenience of the court.

Witness our signatures on this the 7th day of May, 1956.

/s/ Quitman Ross, /s/ Frank F. Mize.

Sworn to and subscribed before me on this May 8th, 1956.

(SEAL)

Loryce E. Wharton, Clerk, by /s/ M. Alford, Deputy Clerk.

[fol. 11] CERTIFIED COPY OF INDICTMENT—
Filed May 8, 1956

State of Illinois,
County of Cook, ss.

Of the May Term of the Criminal Court of Cook County, in said County and State, in the year of our Lord one thousand nine hundred and fifty five.

Count 1. The Grand Jurors, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that one James Shelby one Norman Douglas McLeod otherwise called Nelson Garbitt Gifford otherwise Called Nelson Barburr Glifford otherwise called John Morton one Louis Joseph Abbate otherwise called Louis Abbate and one Michael Falcone otherwise Called Michael Louis Falcone late of the County of Cook, on or about, to wit, the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five in said county of Cook, in the State of Illinois aforesaid, unlawfully, wilfully, frudulently (sic) and deceitfully did conspire, combine, confederate and agree together with each other and with divers other persons whose names are to said Grand Jurors unknown with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure the property of another, to wit: to injure [fol. 12] communication facilities belonging to the Southern Bell Telephone and Telegraph Company, a corporation, without the consent of said Southern Bell Telephone and Telegraph Company, and to injure communications facilities belonging to the American Telephone and Telegraph Company, a corporation, without the consent of said American Telephone and Telegraph Company, by use of explosive, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

Count 2. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths aforesaid, do further present that one James Shelby one Norman Douglas

McLeod otherwise called Nelson Garbitt Glifford otherwise called Nelson Garbutt Glifford otherwise called John Morton one Louis Joseph Abbate otherwise called Louis Abbate and one Michael Falcon otherwise called Michael Louis Falcone late of the county of Cook, on or about, to wit: the ninteenth (sic) day of April in the yeqr (sic) of our Lord one thousand nine hundred and fifty five in said County of Cook, in the State of Illinois aforesaid, umlawfully, (sic) wilfully, fraudulently and deceitfully did conspire, combine, confederate and agree together with each [fol. 13] other and with divers other persons whose names are to said Grand Jurors unknown with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure the property of another, to wit: to injure communications facilities belonging to the Southern Bell Telephone and Telegraph Company, a corporation, without the consent of said Southern Bell Telephone and Telegraph Company, and to injure communications facilities belonging to the American Telephone and Telegraph Company, a corporation, without the consent of said American Telephone and Telegraph Company, by use of explosive, contrary to the law and against the peace and dignity of the same People of the State of Illinois.

Count 3. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one James Shelby one Norman Douglas McLeod otherwise called Nelson Garbitt Gifford otherwise called Nelson Garbutt Gifford otherwise called John Morton one Louis Joseph Abbate otherwise called Louis Abbate and one Michael Falcon otherwise called Michael Louis Falcone late of the County of Cook, on or about, to wit: [fol. 14] the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five in said County of Cook, in the State of Illinois aforesaid, unlawfully, wilfully, fraudulently and deceitfully did conspire, combine, confederate and agree together with each other and with divers other persons whose names are to said Grand Jurors unknown with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to

injure the property of another and commit a felony, to wit: to destroy, damage or injure or render unusable telephone plants belonging to the Southern Bell Telephone and Telegraph Company, a corporation, and to telephone plants belonging to the American Telephone and Telegraph Company, a corporation by use of explosive, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

Count 4. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one James Shelby one Norman Douglas McLeod otherwise called Nelson Garbitt Gifford otherwise called Nelson Garbutt Gifford otherwise called John Morton one Louis Joseph Abbate otherwise called Louis Abbate [fol. 15] and one Michael Falcon otherwise called Michael Louis Falcone late of the County of Cook, on or about, to wit, the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five in said County of Cook, in the State of Illinois, aforesaid, unlawfully, wilfully, fraudulently and deceitfully did conspire, combine, confederate and agree together with each other and with divers other persons whose names are to said Grand Jurors unknown, with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickledly (sic) to injure the property of another and commit a felony, to wit: to destroy, damage or injure or render unusable telephone plants belonging to the Southern Bell Telephone and Telegraph Company, a Corporation, and to telephone plants belonging to the American Telephone and Telegraph Company, a Corporation, by use of explosive, contrary to the Law, and against the peace and dignity of the same People of the State of Illinois.

Count 5. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one James Shelby one Norman Douglas [fol. 16] McLeod otherwise called Nelson Garbitt Gifford

otherwise called Nelson Garbutt Gifford otherwise called John Morton one Louis Joseph Abbate otherwise called Louis Abbate and one Michael Falcon otherwise called Michael Louis Falcone late of the County of Cook, that on, or about, to wit, the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five in the said County of Cook, in the State of Illinois aforesaid, unlawfully, wilfully, fraudulently and deceitfully did conspire, combine, confederate and agree together with each other and with divers other persons whose names are to said Grand Jurors unknown, with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure the property of another and commit a felony, to wit: unlawfully, fraudulently, designedly, wickedly, wilfully and maliciously by explosive of a certain substance (of which is unknown to said Grand Jurors) placed or thrown in, into, upon, under or near property belonging to the Southern Bell Telephone and Telegraph Company, a corporation, and to property belonging to the American Telephone and Telegraph Company, a corporation, to damage or injure such property contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

[fol. 17] Count 6. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one James Shelby one Norman Douglas McLeod otherwise called Nelson Garbitt Gifford otherwise called Nelson Garbutt Gifford otherwise called John Morton one Louis Joseph Abbate otherwise called Louis Abbate and one Michael Falcon otherwise called Michael Louis Falcone late of the County of Cook, that on, or about, to wit; the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five in said County of Cook, in the State of Illinois aforesaid, unlawfully, wilfully, fraudulently and deceitfully did conspire combine, confederate and agree together with each other and with divers other persons whose names are to said Grand Jurors unknown, with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wick-

edly, to injure the property of another and commit a felony, to wit: unlawfully, fraudulently, designedly, wickedly, wilfully and maliciously by the explosion of a certain substance (of which is unknown to said Grand Jurors) placed or thrown in, into, upon, under or near property belonging to the Southern Bell Telephone and Telegraph Company, a corporation, and to property belonging to the American [fol. 18] Telephone and Telegraph Company, a corporation, to damage or injure such property, contrary to the Law, and against the peace and dignity of the same People of the State of Illinois.

Count 7. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one James Shelby unlawfully, wilfully, fraudulently and deceitfully did conspire, combine, confederate and agree together with each other and with divers other persons whose names are to said Grand Jurors unknown, with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure property belonging to the Southern Bell Telephone and Telegraph Company, a corporation, and property belonging to the American Telephone and Telegraph Company, a corporation, and that pursuant to said conspiracy and agreement said James Shelby on, or about, to wit: the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five, in said County of Cook and State of Illinois aforesaid, solicited one Norman Douglas McLeod otherwise called Nelson Garbitt Gifford otherwise called Nelson Garbutt Gifford otherwise called John Morton, one [fol. 19] Louis Joseph Abbate otherwise called Louis Abbate and one Michael Louis Falcone otherwise called Michael Louis Falcone, to injure the said property of said companies by use of explosives, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

Count 8. The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do fur-

ther present that one James Shelby unlawfully, wilfully, fraudulently and deceitfully did conspire, combine, confederate and agree together with each other and with divers other persons whose names are said to Grand Jurors unknown, with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure property belonging to the Southern Bell Telephone and Telegraph Company, a corporation, and property belonging to the American Telephone and Telegraph Company, a corporation, and that pursuant to said conspiracy and agreement said James Shelby on, or about, to wit: the nineteenth day of April in the year of our Lord one thousand nine hundred and fifty five, in said County of Cook and State of Illinois aforesaid, solicited one Norman Douglas McLeod [fol. 20] otherwise called Nelson Garbitt Gifford otherwise called Nelson Garbutt Gifford otherwise called John Morton, one Louis Joseph Abbate otherwise called Louis Abbate and one Michael Louis Falcone otherwise called Michael Louis Falcone to injure the said property of said companies by use of explosives, contrary to the Law, and against the peace and dignity of the same People of the State of Illinois.

John Gutknecht, State's Attorney.

State of Illinois,
County of Cook, ss.

I, Sidney R. Olsen, Clerk of the Criminal Court of Cook County, in said County and State, and Keeper of the Records and Seal thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of Indictment, General Number 55-1309, filed May 25th, A. D. 1955 in a certain cause lately pending in said Court, wherein The People of the State of Illinois were Plaintiffs, and Louis Joseph Abbate otherwise called Louis Abbate was Defendant.

(Impleaded)

(SEAL)

Witness, Sidney R. Olsen, Clerk of said Court, and the Seal thereof, at Chicago, in said County, this thirtieth day of April A.D. 1955, /s/ Sidney R. Olsen, Clerk.

[fol. 21] JUDGE'S AND CLERK'S CERTIFICATE

State of Illinois,
County of Cook,
City of Chicago, ss.

I, Cornelius J. Harrington Judge of the Circuit Court of Cook County; and Chief Justice of the Criminal Court of Cook County, in said State, do hereby certify that Sidney R. Olsen, whose name is subscribed to the above certificate of attestation, now is and was at the time of signing and sealing the same, the Clerk of the Criminal Court of Cook County, and keeper of the Records and Seal thereof, duly elected and qualified to office; that full faith and credit are, and of right ought to be, attached to all his official acts, as such, in all Courts of Records and elsewhere, and further that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal, at my chambers, in Chicago, said County, Thirtieth day of April A.D. 1956.

(SEAL)

/s/ Cornelius J. Harrington, Judge of the Circuit Court of Cook County and Chief Justice of the Criminal Court of Cook County.

[fol. 22] UNITED STATES OF AMERICA

State of Illinois,
County of Cook, ss.

I, Sidney R. Olsen, Clerk of the Criminal Court of Cook County, in and for the County aforesaid, do hereby certify that Cornelius J. Harrington whose name is subscribed to the foregoing certificate of attestation, now is, and was, at the time of signing and sealing the same, Judge of said Circuit Court of Cook County, and Chief Justice of the Criminal Court of Cook County, and was duly elected, commissioned and qualified to office; that full faith and credit are, and of right ought to be, given to all his official

acts as such, in all Courts of Record in the United States and elsewhere and that his attestation is in due form of law and by the proper officer.

(SEAL)

Given under my hand and the seal of said Court, at Chicago, in said County, this the 30th day of April A. D. 1956, /s/ Sidney R. Olsen, Clerk of the Criminal Court of Cook County.

[fol. 23]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

Criminal No. 2697

UNITED STATES OF AMERICA,

v.

LOUIS JOSEPH ABBATA, MICHAEL LOUIS FALCONE, CHARLES G. PERRY, alias ROBERT PERRY, and JAMES SHELBY.

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* * * * * * *

[fol. 730] FRANK FURLIC, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hauberg:

Q. Will you state your name, please, sir?
A. Frank Furlic.
Q. Mr. Furlic, where do you live?
A. 304 South Delphia Street, Park Ridge, Illinois.

By the Court: Where?
Witness: Park Ridge, Illinois.
By the Court: All right.

By Mr. Hauberg:

Q. What is your occupation?

A. I am an attorney at law.

Q. Do you hold any particular position?

A. Yes, sir. I'm Assistant State's Attorney, Cook County, Illinois.

Q. Would you speak a little louder, Mr. Furlic, so all these gentlemen can hear you? You say Cook County, [fol. 731] Illinois.

A. Yes, sir. The county seat of which is Chicago.

Q. Chicago. Is that where your headquarters is located?

A. Yes, sir.

Q. Now, Mr. Furlic, do you know any of the defendants in this case, Charles Perry, James Shelby, Michael Falcone or Louis Abbata?

A. Yes, sir, I do.

Q. Which ones of them do you know?

A. I know Shelby. I know Falcone and I know Abbata.

Q. Did you have any occasion in connection with your official capacity to talk with any of these defendants or investigate anything back in April of 1955?

A. Yes, sir, I did.

Q. Would you please tell us what contacts, if any, you had with any one of these defendants as to whether any of them made any statement to you, when they were made, or who was the first one of those three that you saw?

A. On the 26th day of April, 1955, I saw Louis Abbata about the hour of four o'clock in the State's Attorney's office in Chicago at twenty-sixth Street and California. With him at the time was William Garrity and a police [fol. 732] officer by the name of Levinson. Abbata was then taken to our chief investigator's office. At that time he was Lieutenant. Today he's Captain John Olson.

Q. Yes, sir. About what time of day did you say that was?

A. About four o'clock.

Q. Do you know why Louis Abbata was brought to your office?

Mr. Bellows: Object if the Court please.

By the Court: If he knows of his own knowledge, but don't repeat what anybody else has said.

By Mr. Hauberg:

Q. Do you know why he was brought to your office?

A. That's a rather ticklish question to answer, Your Honor.

By the Court: Can you state whether he was under the custody of any other officer or——

Witness: Yes, sir.

By the Court: And whether he was brought to your office or not?

[fol. 733] Witness: Yes, sir, I already stated for the record he was brought there by Mr. Garrity and Officer Levinson, for interrogation.

By the Court: Let him tell what happened after that.

By Mr. Hauberg:

Q. And then what happened?

A. Then, I proceeded to question Louis Abbata in the office of Captain Olson.

Q. What were you questioning him about?

A. I was questioning him——

Mr. Bellows: Object, if the Court please. That would be a conclusion of this witness, who has no right to say what the conversation was.

By the Court: That's what it means. Go on. I don't see any difference in what he's saying and what you're saying.

By Mr. Hauberg:

Q. Just state what he said.

A. All right. I asked Louis Abbata his name. He told me his name was Louis Abbata. He further stated he lived [fol. 734] at, I thought he said 7345 South Artesian Avenue. He stated that he was married, had a daughter, that his wife was working and his parents, I believe he said, were living with him. I asked him whether or not he was employed at the time. He said no. He stated that he was working as an insurance man. He also stated that prior to that time he had worked for the Liquid Carbonic Corporation and had worked there for some four years. He further stated that before that he worked for the Mercury

Manufacturing Company. He also stated at that time that when he worked for Mercury Manufacturing Company, that he worked for the United Electrical Workers, and he said that when he joined, er, when he went to work for the Liquid Carbonic, he then joined the United Automobile Workers. At that time he said he became active in union activities. He said that he became a steward and he also stated at that time that he subsequently became what he called a bargaining agent for the union. He also stated that it was at that time that he first met Falcone and it was in connection with his work at Liquid Carbonic that he met McLeod. He also——

Q. You say he met who, now?

A. McLeod.

Q. McLeod?

[fol. 735] A. McLeod, yes, sir.

Q. And Falcone, who is that?

A. Falcone is the defendant who is sitting here in the court room.

Q. Is that Michael Falcone?

A. Michael Falcone, yes.

Q. All right. Then, what else did he say about Falcone and McLeod?

A. Well, he said that Falcone was, I think he said he was an inspector there at the Liquid Carbonic, and he said that McLeod did work, I think he said of a similar nature. I'm not too sure about that. However, he——

Q. Were you questioning him during this time?

A. Yes. This is merely what he is telling me pursuant to questions that I have propounded to him.

Q. Did he know where he was when you were questioning him?

A. Well, I am sure he knew where he was. I don't believe there's any question about that.

Q. All right. This statement he gave you, was it oral or written?

A. At the time the statement was taken, I had one of our State's Attorney's court reporters there, a boy by the name of Essen, and as I asked him questions and he made [fol. 736] answers, those were subsequently taken in shorthand and subsequently reduced to writing.

Q. Well, now, at the time he was making the statement to you, was he telling you this, or answering your questions, freely and voluntarily, or had there been any promise made to him?

Mr. Bellows: Object, Your Honor. That would also be a conclusion, whether it was free or voluntary.

By the Court: The objection is overruled.

Witness: Yes, he was.

By Mr. Hauberg:

Q. Was what?

A. He was answering the questions freely and voluntarily.

Q. Had you or anyone else connected with your office, with your organization, or any other of the law enforcement organizations, promised him anything?

A. No, sir.

Q. All right. Go ahead and continue with what he said.

A. He then further stated that he met a Tony Audio [fol. 737] for the first time. He said that Tony Audio was what he termed a "special representative" for the—or International representatives, rather,—for the United Automobile Workers in that particular area. That he wasn't connected with any particular local, but that it was his job to supervise certain activities within the various locals with-in the various areas. That he got to know Audio very well. He also stated that because of some infection that he had had on his hand, that he left the Liquid Carbonic Corporation and didn't engage too much in union activities, although from time to time he did contact Audio. He did say, also, that among other things he was quite active while he was with the Liquid Carbonic people and with the Mercury Manufacturing people, that he was quite active in strike activities, and that he did say while there was a strike at the Liquid Carbonic Corporation, that he was on what he said was the Strategy Committee, a committee of the local union.

And, then, I proceeded to question him a bit further about the instant case in question, and I asked him when was the first time that he had—I asked him where he had

been arrested. He told me he had been arrested in the telephone company's office there in Chicago. I asked him what he was arrested for. He said he was arrested in [fol. 738] connection with the Southern Bell Telephone strike. I then asked him what he knew about the Southern Bell telephone strike. He told me that he had received a phone call, I think he said about the 15th of April, 1955. I think he said it was in the evening. And, at that time, I asked him who made the phone call and he said Audio made the phone call. I said, "How do you know it was Audio?" He said, "Well, I have known Audio for some time and I know his voice, and he said he was Audio." I said, "What did Audio say to you?" "Audio said——" He said, "Audio said something about that Italian confetti. And I said to Audio that I, er, Italian Confetti? I don't quite get you." He said, "When you're talking about that Italian confetti, I don't want any of that business violence." And Audio said to him, said, "Well, just to scare people." And Audio said at that time, "There's going to be money in it for you," and Abbata said that although he, himself, wouldn't do any of that rough stuff, nevertheless, he felt that he had two men he could contact that he knew, fellow by the name of Falcone and fellow by the name of McLeod. And, then, he said that they talked about each other's families and Audio told him that he would, that someone would contact him concerning the conversation which they had on that particular night.

[fol. 739] Q. Did Abbata tell you if someone contacted him?

A. Yes, Abbata then said that, I think he said it was the following day. I'm not so sure. He said that he received a phone call and he identified the voice as kind of southern voice. And the voice said to him, he said he didn't know who it was, but the voice said to him, "I'm the man Audio said you should contact." And he said, "I don't want too much talking on the phone, but that Jim Shelby is in town".

Mr. Ross: Your Honor, we object to that about Jim Shelby.

By the Court: I'm going to make the same ruling that I made before. I'll let it in and then determine when it's time to charge the jury what the law is.

Mr. Ross: I think I shoud (sic) do one thing, Your Honor, that is, ask the court at this time to declare a mistrial as to the defendant Shelby and grant us a separate trial.

By the Court: That is denied.

Mr. Ross: Now, then, may we have a continuing objec-
[fol. 740] tion to any testimony from this witness referring to the defendant Mr. Shelby.

By the Court: I am not going into any discussion of the picture at this time to tell you why I am making this ruling, but I am making it and I'm making it general, but when it comes time to charge the jury, then, I will tell them what the law is. Go ahead.

By Mr. Hauberg:

Q. All right, sir. Then, what did Abbata say?

A. Then, Abbata stated that that voice said that he was down at the Morrison Hotel, and Abbata said that he told this individual he didn't want to be meeting anybody down at any Morrison Hotel. And, then, he stated that he—he stated that the voice told him he would receive a further phone call concerning any further meeting. Abbata then said after that telephone conversation, he then got in touch with McLeod. I don't recall whether he said he got in touch with McLeod at a tavern at Twenty-First Street in Chicago, or out at his home. I'm not too sure about that. But he said that he talked to McLeod and told McLeod that he thought that it would be a good thing if McLeod was with them, because he didn't know whether or not he, speaking about Abbata, was in trouble or not, and that he thought [fol. 741] he also ought to call Falcone, so that Falcone could go along and be with them at the time. So, he said that he later got in touch with Falcone. How he got in touch with him, I don't know. But he did say that Falcone didn't have a phone at his home, but he nevertheless did reach Falcone. He said it wasn't too long after that that he again received a phone call and he said that the voice told him that this man Shelby that he was talking about would be standing down on the corner of, I think he said the northeast corner of, Madison and Dearborn Streets in

the City of Chicago. At the time he would have a brown envelope in his hand and that they were, at that time, to pick him up.

Q. Did Abbata say that he met with Jim Shelby?

A. Yes. He then stated that later that day that he and Falcone and McLeod then got into Abbata's automobile. I think he said he an Oldsmobile. (sic) That they drove down town. That when they approached the vicinity of Madison and Dearborn Streets, that he talked about making an improper left turn, but nobody apparently paid too much attention to it. Then he saw a man standing on the corner, on a corner there, with an envelope who motioned to him and he then stopped and picked up the person whom he said was a person called Shelby. He then stated [fol. 742] that he and Shelby and Falcone and McLeod then proceeded to what we call the outer drive there in Chicago, and that they went through a short street near the outer drive and they stopped and they began to talk. That, at that time, Falcone—that at that time Abbata said that Shelby told him that there was a strike in the south, that it was a bad strike, that they were tearing dresses and skirts off women in the city where the strike was going on. He said that Shelby told him that he was a union man and that he ought to stick with them and that what he wanted Abbata to do, or Abbata I think he's properly called, that he wanted Abbata to have someone or himself go down there and dynamite a few what he was talking about red huts and white huts. That Abbata at that time said that as far as he was concerned, he was strictly a contact man and that he felt that the fellows to do it were McLeod and Falcone. And he said that while this conversation was going on, that Falcone and McLeod were in the back seat. He then stated that he became a little jittery, because not too far from where they were sitting, he observed squad cars. He said that he identified it by the red dome up on top. And he told Shelby that they shoud (sic) leave there so that they might not be tailed, might not be arrested for interrogation.

Q. Did Abbata tell him where they were?

[fol. 743] A. Abbata said that they then proceeded to Twenty-Second and Wabash Streets, that they proceeded

from Twenty-Second and Wabash over to Eighteenth and Wabash, and he stated that they stopped at that time at a place which was a tavern known as Calvert's Tavern. He said that the four of them then entered Calvert's Tavern.

Q. What four entered Calvert's Tavern?

A. He said he and Shelby and Falcone and McLeod entered Calvert's Tavern; that they sat in a booth and that he said he had ordered a "seven-up" and that then Shelby began to talk.

Q. Did Abbata tell you what Shelby did there in that booth?

A. Yes.

Q. What did Shelby do there, according to Abbata?

A. Abbata said that Shelby then opened an envelope and in the envelope was a large map and what he called "plans", and he said that Shelby would point to certain spots on these plans and designate them as red huts and white huts. He said that Shelby told Abbata at that time that those were the places that they wanted dynamited. Abbata then——

Q. Did Abbata say what happened to those plans?

A. Yes, Abbata said before they left that night, he [fol. 744] said——

Mr. Bellows: Object, Your Honor. I think Mr. Furlic was in the process of testifying when Mr. Hauberg interrupted him and asked another question. I think Mr. Furlic had something more to add to his statement.

By the Court: Well, you can bring it out. He's conducting his side of it and when you get him on cross examination you can bring it out. How much more of this is there going to be?

Mr. Hauberg: Court, please, I imagine he has a good bit more testimony.

By the Court: Well, we're going to quit at this time and I want to impress upon the jury not to talk to anyone while you're recessed.

[fol. 750] Whereupon, Frank Furlic having been called as a witness, direct examination continued as follows:

By Mr. Hauberg:

Q. Mr. Furlic, I believe that when we recessed on yesterday, you were about to continue with the statement that the defendant Abbata made to you as to what happened in the tavern there with reference to certain plans.

A. Yes, sir.

Q. All right, sir. Would you continue, please?

A. Abbata stated to me that the plens (sic) were laid out. He stated to me that——

By the Court: A little bit louder.

A. (Continuing) Sorry. He stated to me that also present at the time were Shelby, Falcone, himself and McLeod. [fol. 751] That at that time Shelby told him that certain designated places on the map were places that were to be dynamited. He also stated at that time that there was some talk between them as to what it was going to cost and what they were going to get and he stated that Shelby stated they were paying the fellows down south two hundred dollars. And with that, McLeod said that was "peanuts". And Abbata stated at that time that far as he was concerned, he wasn't going down south, he was going to be only the contact man. Then, he stated that they proceeded to drive downtown. That he let Shelby off.

And, then, he said to me, he says, "I forgot to tell you." He says, "Before we left, I told, I asked Shelby how about expenses, and he told me that Audio would get in touch with me and there ought to be five hundred dollars in it for you as expenses." He then stated that the following day he received a call from Audio and he said that in his conversation with Audio that he was strictly going to be a contact man and that under no circumstances would he consider anything unless there was some type of expenses and he said Audio told him that he would call him back.

Q. Did Abbata ever tell you when he was talking to you there that he got any expense money?

[fol. 752] A. Yes.

Q. How much expense money did he get?

A. He told me that he got five hundred dollars expense money.

Q. Did he tell you what he did with that expense money?

A. Yes, he said that he gave two hundred dollars of it to McLeod and fifty dollars to McLeod's wife and that another fifty dollars, he gave to Falcone, and the other two hundred dollars he kept for himself.

Q. Did Abbata tell you anything about McLeod getting any dynamite or leaving Chicago?

A. Yes.

Q. All right.

A. He told me, I think it was on the week of the 21st or 22nd, I'm not too sure, that he picked up McLeod and that he said he wouldn't give McLeod any money because he wasn't sure whether McLeod would go down to Mississippi or not, because he figured he might spend the money for something else. So, that, he then picked him up and said he took him over to the I.C. station and at that time he gave him the money.

Q. Did he tell you whether McLeod had any baggage with him when McLeod left up there?

[fol. 753] A. I don't remember that. I think he said he had a bag. I'm not sure.

Q. What else did Abbata tell you with reference to this dynamiting and these plans?

A. As far as the—then, as far as the plans are concerned, he then said it was the following Sunday that McLeod came back, he called him up, and said to him that "you're in trouble with Audio".

By the Court: Who was that in trouble with Audio?

Witness: Abbata.

By the Court: All right.

A. (Continuing) And Abbata then said that he had gotten in touch with Falcone and told Falcone there ought to be an easier way to make a buck by selling the plans to the telephone company there in Chicago. He then said that he called the local office in Chicago and talked with a fellow by the name of "Peck" and that he was then told to call Southern Bell.

By Mr. Hauberg:

Q. Let me ask you this. Did he say anything about making any copies of these plans that Shelby had given [fol. 754] him?

A. Yes, he did.

Q. What did he say about that?

A. At the time we had the plans in the office, the copies. I showed him the copies and I asked him about those. He said that after he had called the telephone company that he and Falcone had gone down town, that he had, I think, either one or two or three originals that he said he showed to a fellow who represented himself as Garrity and that he then returned to Falcone's home and while they were at Falcone's home that he, Abbata, commenced to type and that he wasn't getting along so well; that, then, a little girl by the name of Barbara Navarro typed the plans and he said that he directed Falcone to do the diagraming and to do the writing and the printing on the plans.

Q. Did he tell you that Falcone did anything with reference to the plans?

A. Yes, he did.

Q. What did he tell you about that?

A. He told me that each copy that was typed, that the lines and the names and the feet were all written in by Falcone, and it was about that time that I asked him where the originals were, and he told me they were at home. [fol. 755] I asked him if he would give us written authorization to go to his home and obtain the originals. He said he would. So that I prepared a piece of paper in which he gave our policeman authority to go to his home and obtain the originals. Subsequently to that time, the originals were brought into my office, I showed him each one of the originals, he identified the originals as being originals he had obtained from Shelby at the Calvert Hotel, at the tavern.

Q. All right, now, did he tell you anything else with reference to this matter of plans and Shelby, McLeod and Falcone and this area down here in the south in Mississippi?

A. I think that was what I testified to already. I think that, in substance, is it?

Q. I believe you said you knew the defendant Michael Falcone?

A. Yes, sir.

Q. Did you have any occasion to have a talk with Falcone in connection with these activities that you testified about?

A. Yes, sir, I did.

Q. Tell us where that conversation took place?

A. Subsequent to the arrest of Abbata, Falcone was [fol. 756] arrested and was brought to the State's Attorney's office. He was taken to the same office for interrogation that Abbata was, namely, the Chief Investigator, John Olson's office. At that time, he told me his name was Michael Falcone.

Q. At the time, he was telling you this, I will ask you if any promises had been made to Falcone, whether or not he expected any reward, or anything, for giving you this statement?

A. No, sir, no promises of any kind were made whatsoever.

Q. Would you say whether it was made freely and voluntarily or whether it was forced out of him?

A. I would say it was free and voluntary.

Q. All right, now. Go ahead, sir, and relate what that conversation was.

A. He said he lived at 2224 West Twenty-fourth Street in Chicago and he lived in Chicago most of his life. That he was married and had two children. Said that he worked for the Liquid Carbonic Corporation and had worked there since about 1951. I think he said he was working there at the time of his arrest. He said that he knew Norman McLeod intimately and that he knew Abbata as, he said, financial secretary of the U.A.W. which was the local union [fol. 757] in the Liquid Carbonic Corporation.

Q. Well, did he tell you anything about meeting with McLeod and Abbata anywhere in Chicago?

A. Yes, sir.

Q. In the middle of April, 1955.

A. Yes, he did.

Q. All right, what did he say about that?

A. He said somewhere around the 15th or 16th of April

that he had received a phone call from Abbata, that Abbata told him that he had received a call in which there was some work that had to be done down south, that he said that there was a strike going on down there, that Abbata told him that there was going to have to be some—that he was told there was going to have to be some dynamiting done, and he said as far as he was concerned, he didn't want to have any part of the dynamiting, but he could use a buck.

Falcone then stated that Abbata told him that there was to be a meeting down town with some man that was coming up from the south. And, then, he stated that it was a short time after that that Abbata picked him up and picked up McLeod. That the three of them then drove down into the City of Chicago; that they drove to the what is known as Madison Street and Dearborn; that on the northeast [fol. 758] corner of Dearborn and Madison Streets that a man was picked up who got into the automobile. That he described him as a person with a southern drawl and he said his complexion was somewhat between mine and his and that he had a nose that was somewhat like mine. That he wasn't too sure of the description.

Q. Did he tell you whether or not he was introduced to this man?

A. He said that formally he wasn't introduced, but to the best of his recollection at that time that the name "Shelby" kind of rang a bell. And he said that while they were in the car, he wasn't too sure of what was being said, and that it wasn't until they had reached the vicinity of Eighteenth and Wabash that he heard conversation. He said that at that time that he and this man that he called Shelby and Abbata went into the tavern. He said that McLeod stayed on the outside and he said that while they were in the tavern, he sat there with them and that Shelby took out some plans and he was talking about places that had to be damaged, as he put it, and he said they were talking about dynamiting there, generally, but that he——

Q. Did he say whether McLeod came in while they were there?

A. Then, he said that he went out and when he went out, [fol. 759] then, he said, McLeod went in. And that he

remeined (sic) on the outside while the three of them were inside the tavern and then, in some ten or fifteen minutes, the three of them came out and the four of them drove to the vicinity of what we call "the loop" and at that time they left Shelby off.

He then said that he and McLeod and Abbata talked about what had gone on within the tavern and he said that at that time Abbata said that they were, that they wanted, that he wanted Abbata to get someone to go down south and dynamite some of these spots or positions that had been marked off on the map because of the seriousness of the strike that was going on in the south. That Abbata said that he told Shelby that as far as he was concerned, that he was going to be the contact man, but he told Shelby that he thought he could get McLeod or Falcone to go down there. And Falcone stated at that time that he told Abbata that as far as he was concerned, he wasn't gonna go down south and that he wasn't going to engage in any violence. That he then said that there was some talk there about money and that Abbata said he was to receive a phone call and that he was to receive some expense money. He then stated it was a day or so later, I can't exactly remember which, in which Abbata got in touch with him [fol. 760] and that he and McLeod and Abbata worked together, I think he said, at a tavern, and at that time he said that Abbata gave him a hundred dollar bill and he said that he went into a barber shop and broke the hundred dollar bill.

Q. Who went in the barber shop?

A. He did.

Q. Falcone?

A. That's right. And that he came out and that he kept fifty for himself and gave fifty dollars to Abbata. He said that he didn't see any money given to McLeod at that time. He did say in a subsequent conversation that he had with Abbata, that Abbata told him—he asked him how much money he had gotten, and Abbata said he had gotten five hundred, and he said, "Well, what did——

Q. What was this money for? Did Falcone tell you?

A. Yes, he said that Abbata told him that this five hun-

dred dollars was to be used for expenses for going down to Jackson, Mississippi.

Q. Was anything said about anyone carrying any dynamite to Jackson, Mississippi?

A. No, he said they talked about dynamiting, but about no one carrying any dynamite down there, no, that was not said.

[fol. 761] Q. All right. Go ahead.

A. And, then, he said that later, that during that telephone conversation, that Abbata said to him, he said, "I gave two hundred to McLeod and another fifty to McLeod's wife", and he said he asked Abbata what he did with the rest. He said, "Well, the rest of it was a ten here and a ten there," and then that was, in substance, what the conversation was that occurred at that time.

He said that that was the last he saw of McLeod. He then further said that he received a call from Abbata in which Abbata told him he had heard from McLeod and that McLeod was raising a lot of hell and that he thought that here was a chance now to make some money, or make an extra buck, by selling the plans to the telephone company. And——

Q. Now, did Falcone tell you anything about where the original plans were then or later?

A. Yes, he told me that at the time that they were in the tavern that he saw Shelby give Abbata what he later described as the plans.

Q. Did he tell you that he saw those plans any more after he said Shelby gave them to Abbata?

A. Yes, sir, he did.

Q. When did he say he saw them again? Did he tell you?

A. He said that he saw them again, I think it was, on [fol. 762] the night of the 24th. He said that it was after he and Abbata had driven down town and Abbata—and he and Abbata got out of the car and Abbata gave him the keys and Abbata then took a cab over to where he was to meet this man they called Garrity. And that after Abbata came back and Abbata told him that he had showed this man Garrity, showed him, at least, a semblance of what the plans were, that then the two of them, he said, then went to Falcone's home. And Falcone stated that

after they arrived at his home, that Abbata told—that Abbata then began to type and he wasn't doing a very good job of it and a little Navarro girl who had a date with Falcone's daughter came there and they learned that she knew how to type and they offered her a couple of bucks if she would do some typing for them. And Falcone said that while she was there typing that Abbata was directing him to draw the plans on each one of the documents, which portrayed some particular plant in the respective states. I think it was Mississippi, Louisiana and Tennessee. And then I showed him the respective plans. I showed him some of the copies there in the office. I had him identify each particular group. I asked him there in the office whether he, himself, had drawn those plans and he said he did. I asked him whether or not he, himself, had written what handwriting was on those particular plans and he said that he did.

[fol. 763] Q. Now, the plans he said he had written on, were they the original plans?

A. No, sir, those were the duplicates of the originals.

Q. All right. Then, what did he say happened?

A. He then said that after he had done the diagraming and the typing was done, he said that then Abbata told him that he had another meeting with the telephone company officials, and that he told him that there was talk of some six thousand dollars and with that, he said that Abbata left and the following day, why, Abbata was arrested and Falcone was brought to our office for interrogation.

Q. Well, now in your conversation with the defendants Abbata and Falcone, how many different times was it they talked to you about it?

A. You say both Abbata and Falcone?

Q. Yes, both of them.

A. Abbata talked—I talked to Abbata twice and I talked to——

Q. At the same time or different times?

A. No, at different times.

Q. How many times was it that Falcone discussed this with you?

A. I talked to Falcone on three different occasions.

* * * * * * *

[fol. 1096] APPLICATION FOR PROBATION ON BEHALF OF FALCONE AND ABBATE

Mr. Bellows: Your Honor, on behalf of Falcone and Abbata, I would like to make application for probation. I would like to say this for both of them. Both of them are indicted in Cook County, Illinois, on the same charge and they both pled guilty there and they have received sentences of three months. Abbata has never been in trouble before, Falcone once. I think Falcone, Your Honor, if I may use the term, is a fool. I think he just thought it was smart. Using the vernacular, I think he went along for the ride. I don't think he was deeply involved in the situation.

Furthermore, Your Honor, both men, of course, never came down here. Whatever overt act took place was just a matter of meeting in Chicago. Furthermore, I would like to call to Your Honor's attention this: that almost simultaneously with the conspiracy, because the evidence shows the conspiracy commenced, according to the evidence and I'm not arguing with the evidence at this time, but it commenced approximately the 18th or 19th of April. Almost simultaneously the Defendant Abbata communicated [fol. 1097] with the telephone company in the interest of receiving an award that had been posted. Now, it doesn't seem possible that a man could be guilty of that and at the same time desiring,—he had information and was trying to help them at the same time.

I am saying this in regard to the application for probation that especially Falcone, when the jury and I think it is comprised of twelve able men, twelve ordinary people, who never had seen these people before, felt that Falcone was, as I have used the word, just a duck. He just went along. He's been punished already in Cook County for the same identical thing, conspiracy as charged here.

So, Your Honor, I submit to you that something ought to be done if Abbata, who is responsible—and I'm looking at it from the point of view of prosecution—had it not been for Abbata—I'm not painting any roses on him as to what he's done, for many reasons,—but had it not been for Abbata, he wouldn't have been arrested. Nobody would have been involved. Mr. Falcone, I think, Your Honor may

have had a report from the Probation Department of Cook County that he had paid his debt to society in one instance. I know something about that. I think he's a pretty decent individual, a hard-working man, a man with a family. [fol. 1098] I feel, Your Honor, if you want justice done to the Government of the United States, that you grant him probation.

Your Honor said, in denying the motions, that he had had forty-odd years on the bench and I an (sic) sure Your Honor has consideration and sympathy and human kindness of heart. For Falcone, I plead you grant probation.

Mr. Hauberg: Court, Pleace, (sic) the Government will object to probation for any of these defendants. Although Abbata and Falcone were charged from Chicago, we contend it was not the identical offense, but an offense against the State of Illinois. No mention was made of the indictment in Chicago, which was Government owned, operated and controlled communication lines, and I think the indictment here would indicate that. We certainly do oppose any probation in this case.

Mr. Bellows: May I say this: Other than as stated in the indictment, the Government possibly wasn't involved. But it was the same offense. Otherwise, it would have been tried in Illinois.

By the Court: Of course, you recognize that no matter [fol. 1099] what penalty they received up there in Illinois, the State law wouldn't hold in Federal Court.

* * * * * * *

[fol. 1116]

IN UNITED STATES DISTRICT COURT

JURY VERDICT—Filed June 22, 1956

This day came into open court the United States Attorney, prosecuting for and on behalf of the United States, and also came Charles A. Bellows, Frank F. Mize, Quitman Ross and Thomas S. Adair, attorneys of record for the defendants, and the defendants Louis Joseph Abbate, Michael Louis Falcone, Charles G. Perry, alias Robert Perry, and James Shelby, in their own proper persons,

who on May 8th, 1956 had been legally arraigned and had plead not guilty to the charge in the above styled and numbered indictment against them; and of that they put themselves upon the country; and the Unites (sic) States Attorney did the like.

Thereupon came Willie W. Decell and eleven other good and lawful men who composed the jury and who, having been examined, accepted and sworn to try the issue joined between the United States and the defendants, after hearing the testimony of all witnesses, the arguments of counsel, and the instructions of the Court, and having duly considered the same, returned into open court the following verdict:

> "We, the Jury, Find the Defendants, Louis Joseph Abbate, Michael Louis Falcone, Charles G. Perry, [fol. 1117] James Shelby, Guilty as Charged in the Indictment. We, the Jury, Recommend Leniency for Michael Louis Falcone, Charles G. Perry."

Whereupon the Court deferred imposition of sentence against each of said defendants, Louis Joseph Abbate, Michael Louis Falcone, Charles G. Perry, alias Robert Perry, and James Shelby and directed that said defendants be released on their present court appearance bonds until July 9th, 1956.

This the 22nd day of June, 1956.

[fol. 1124]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

[Title omitted]

SENTENCE OF ABBATE—July 9, 1956

On this 9th day of July, 1956, again came the attorney for the government and the defendant appeared in person and by his attorney, Charles A. Bellows;

It is adjudged that the defendant has been convicted upon his plea of Not Guilty, and a Verdict of Guilty of

the offense of violating Section 371, Title 18, U.S.C.; knowingly, wilfully, unlawfully and feloniously combine, conspire, confederate, and agree to violate Section 1362 of Title 18, U.S.C.: injure and destroy, and caused to be injured and destroyed, certain works, property and material known as coaxial repeater stations and micro-wave towers which were located in the States of Mississippi, Tennessee and Louisiana, and which were essential and integral parts of systems and means of communication operated and controlled by the United States, and to interfere in the use and working of communication systems operated and controlled by the United States by damaging same, and [fol. 1125] to obstruct hinder, and delay the transmission of communications over communication systems operated and controlled by the United States, and in furtherance of and for the purpose of carrying into execution the said combination, conspiracy, confederation, and agreement, did and performed certain overt acts,

as charged in Court #1,

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of——

Three (3) Years and pay a fine in the amount $1,000.00;

and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Adjudged that upon the filing of a bond in the sum of $5,000.00 approved by a United States Commissioner for the Southern District of Mississippi, that execution of the above sentence be stayed until July 19th, 1956, and [fol. 1126] that said defendant surrender himself to the

custody of the United States Marshal for the Southern District of Mississippi at Jackson, Mississippi by four (4) o'clock, P.M. on July 19th, 1956 to begin serving said sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Ben C. Dawkins, Sr., United States District Judge.
Loryce E. Wharton, Clerk.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

[Title omitted]

SENTENCE OF FALCONE—July 9, 1956

On this 9th day of July, 1956, again came the attorney for the government and the defendant appeared in person [fol. 1127] and by his attorney, Charles A. Bellows,

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a Verdict of Guilty of the offense of violating Section 371, Title 18, U.S.C. knowingly, wilfully, unlawfully and feloniously combine, conspire, confederate, and agree to violate Section 1362 of Title 18, U.S.C.; injure and destroy, and cause to be injured and destroyed, certain works, property and material known as coaxial repeater stations and micro-wave towers which were located in the States of Mississippi, Tennessee and Louisiana, and which were essential and integral parts of systems and means of communication operated and controlled by the United States, and to interfere in the use and working of communication systems operated and controlled by the United States by damaging same, and to obstruct, hinder, and delay the transmission of communications over communication systems operated and controlled by the United States, and in furtherance of and for the

purpose of carrying into execution the said combination, conspiracy, confederation, and agreement, did and performed certain overt acts, as charged in count #1, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

[fol. 1128] It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

One (1) Year.

It Is Adjudged that upon the filing of a bond in the sum of $5,000.00 approved by a United States Commissioner for the Southern District of Mississippi, that execution of the above sentence be stayed until July 19th, 1956, and that said defendant surrender himself to the custody of the United States Marshal for the Southern District of Mississippi at Jackson, Mississippi by four (4) o'clock P.M. on July 19th, 1956 to begin serving said sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Ben C. Dawkins, Sr., United States District Judge.

/s/ Loryce E. Wharton, Clerk.

[fol. 1190]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16226

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY and JAMES SHELBY, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeals from the United States District Court for the Southern District of Mississippi

OPINION—August 8, 1957

Before Rives, Jones and Brown, Circuit Judges.

Rives, Circuit Judge: The four appellants were jointly indicted for conspiring[1] to commit the offense denounced by 18 U.S.C.A. 1362,[2] that is, willfully or maliciously to [fol. 1191] injure or destroy means of communication operated or controlled by the United States. The overt acts charged extended over a period of ten days, from April 19

[1] In violation of the general conspiracy statute covering a conspiracy "to commit any offense against the United States." 18 U.S.C.A. §371.

[2] "§1362. *Communication lines, stations or systems*

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

to April 28, 1955. A strike was then going on by the Communication Workers of America, CIO, against the Southern Bell Telephone and Telegraph Company.[3]

The defendants Shelby and Perry were officers of the Communication Workers of America, Shelby being an assistant to a vice-president stationed in Washington, D. C. and Perry being President of the Jackson, Mississippi local of that union. Abbate and Falcone were residents of Chicago, Illinois. Norman D. McLeod, also named in the indictment as a co-conspirator but not indicted, was on parole from the Oklahoma State Penitentiary where he had been serving a sentence for armed robbery. He turned state's evidence and was the first and perhaps the principal witness for the Government.

Prior to arraignment, Shelby and Perry filed a joint motion for a severance and separate trial, setting out that Abbate and Falcone had been convicted in the Criminal Court of Cook County, Illinois[4] for a crime based upon the identical acts charged in this case, and that, subsequent [fol. 1192] to their arrests in Illinois, Falcone and Abbate had made lengthy confessions and statements implicating Shelby in the alleged conspiracy. Their motion for severance was overruled.

McLeod's testimony consumes nearly 200 pages of the typed record. He testified in detail to the formation of the conspiracy and to the acts of each of the conspirators. If believed by the jury, his testimony sufficed for the conviction of all four defendants. Its credibility, however, was severely attacked, not only because of its inherent weakness as the testimony of a co-conspirator, but also because of his conviction of grand theft in California and of armed robbery in Oklahoma. Further, McLeod admitted to a long career of criminal dynamiting, and had refused to testify for the Government until assured by one of the attorneys for the telephone company that "he would see to it" that McLeod was not indicted for conspiracy, and, apparently,

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[3] According to the testimony, the strike began about March 14 and continued until about May 20, 1955.

[4] In their pre-sentence hearing it was brought out that they pleaded guilty and received sentences of three months.

that promise had been kept. The Government, therefore, made every effort to corroborate McLeod's testimony.

The taxicab driver who had transported McLeod from Canton, Mississippi to Jackson, Mississippi was produced, as was the Chicago bartender in whose tavern the conspiracy had been hatched. Abbate was the only conspirator other than McLeod whom the bartender could definitely identify. The Government then introduced an investigator for the Illinois Bell Telephone Company and a detective attached to the Chicago Police Department, who testified at great length concerning the statements and admissions of Abbate which did corroborate McLeod [fol. 1193] in many particulars, including operation sheets and maps showing details of the planned criminal dynamiting. Over the strenuous objections of Shelby and Perry, the testimony as to Abbate's statements and confessions was admitted for the time being as against all four defendants, with the court stating,

> "After its over, I shall tell the jury as to how to weigh the evidence. It's incomplete at this time. The case is incomplete and I, myself, I am not fully informed to instruct the jury."

This testimony was received about the middle of the week-long trial.

The Government continued to present a most impressive case. It introduced experts to prove that the Government operated and controlled many of the telephone circuits planned for destruction. It showed by former co-workers of Shelby and of Perry that they had worked on Government circuits and were familiar with their operation and control. It proved Shelby's transportation to Chicago and his registration at a hotel there under an assumed name. It proved by a stenographer that she had retyped the operation plans at the instance of Abbate and Falcone. It proved by two young women residents of Jackson, Mississippi, that, at Perry's request, one of them had accompanied McLeod on a tour of inspection to familiarize himself with the installations to be dynamited, the young woman posing as his wife to allay suspicion in the event they were questioned. As an impressive closing witness, the Government

introduced Frank Furlic, Esquire, Assistant State Attorney of Chicago, Illinois, who had interviewed Abbate and Fal-
[fol. 1194] cone. The court again declined a mistrial and separate trial as to Shelby and Perry, and declined to limit the consideration of Abbate's and Falcone's statements to the one making the statements, stating that "* * * when it comes time to charge the jury, then, I will tell them what the law is."

At four fifteen on Friday afternoon, the last day of the trial, the court commenced its lengthy (more than forty typed pages) charge to the jury. When that charge had been more than half completed, the court finally got around to instructing the jury as follows:

> "Now, as to these two men, when they were arrested by the officers and were placed in prison, they no longer had any power to commit acts or to do things that might bind the others and for that reason, while I had some question in my mind at first, a careful examination of the law has convinced me that I should charge you that insofar as their statements to the police officers up there are concerned, and to the extent that they may involve anybody else, it is not to be considered against the other person. In other words, it can be considered against them alone and it can, even though they were out of the conspiracy, that evidence is admissible against them for the purpose of proving that they were parties to the conspiracy. In other words, they can make admissions insofar as they are concerned and it is receivable in evidence to be received along with all the other evidence to determine whether they were parties to the conspiracy."

[fol. 1195] It is not necessary now to rule on whether the district court abused its discretion in overruling the joint motion of Shelby and Perry for a trial separate from that of Abbate and Falcone,[5] for upon the plainest of principles it is clear that the judgments of conviction against them must be reversed. At the time of their statements, Abbate and Falcone were no longer parties to the con-

[5] See Schaffer v. United States, 221 F. 2d 17, 19 (5th Cir. 1955).

spiracy. Permitting their statements to be received in evidence against Shelby and Perry was error which could not be cured by the mild admonition contained in the court's final charge to the jury.[6]

As against Abbate and Falcone, the case is different. They undertook to withdraw from the conspiracy and to secure a bid of some six thousand dollars from the telephone company for the maps and operation plans. They had themselves, however, already committed overt acts and had dispatched McLeod on his mission of criminal destruction. Their crime was then complete,[7] and their subsequent withdrawal could be considered only in the fixing of their punishment.

While the conspiracy was in progress, Abbate and Falcone were bound by the knowledge of Shelby and Perry that many of the circuits to be destroyed were operated and controlled by the Government. Further, the jury could well find that they conspired to stop all communications over any of the cables or facilities regardless of who oper- [fol. 1196] ated or controlled the circuits, and were bound by what would have been the natural consequences of their conspiracy.[8]

The destruction by dynamite of some of the facilities near Jackson, Mississippi occurred on April 28, two days after Abbate and Falcone had been arrested in Chicago. Such acts, however, stand upon a different footing from declarations of co-conspirators, and were relevant as additional proof of the conspiracy.[9] The facilities destroyed

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[6] Delli Paoli v. United States, 352 U.S. 232 (1957); Lutwak v. United States, 344 U.S. 604, 617, 618 (1953); Krulewitch v. United States, 336 U.S. 440, 443 (1949); Fiswick v. United States, 329 U.S. 211, 217 (1946); Scarborough v. United States, 232 F. 2d 412, 415 (5th Cir. 1956).

[7] See United States v. Britton, 108 U.S. 199 (1883); United States v. Beck, 118 F. 2d 178 (7th Cir. 1941); Eldredge v. United States, 62 F. 2d 449 (10th Cir. 1932).

[8] See Pereira v. United States, 347 U.S. 1 (1954); Clark v. United States, 213 F. 2d 63, 65 (5th Cir. 1954); Williams v. United States, 295 Fed. 302, 305 (5th Cir. 1923); United States v. Anderson, 101 F. 2d 325, 330 (7th Cir. 1939).

[9] Lutwak v. United States, 344 U.S. 604, 617 (1953); Eldredge v. United States, 62 F. 2d 449, 451 (10th Cir. 1932).

were among those included in the criminal plans. Shelby and Perry were still at large, and the jury could reasonably infer that they were still acting pursuant to the conspiracy.

There was ample evidence from which the jury could have found that, though the facilities were owned by the telephone company, many of the circuits were under full time operation and control by the Government, and that the telephone company could not even make repairs on such circuits without first obtaining the Government's permission. The statute, 18 U.S.C.A. §1362, Footnote 2, *supra,* does not require that the Government own the lines or means of communication, but only that they be "operated or controlled by the United States." At least six witnesses testified to facts from which the jury could find such operation or control. Since that issue was so [fol. 1197] strongly controverted, we find no reversible error in admitting the testimony of the two Army officers stressing the importance of the lines of communication to the National defense.

As to Abbate and Falcone, the judgments are affirmed, and as to Shelby and Perry, the judgments are reversed and the cases remanded.

Affirmed in Part and Reversed and Remanded in Part.

[fol. 1198]

IN UNITED STATES COURT OF APPEALS

No. 16226

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY and JAMES SHELBY,

v.

UNITED STATES OF AMERICA.

JUDGMENT—August 8, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court as to Abbate and Falcone in this cause be, and the same are hereby, affirmed; and as to Shelby and Perry, that said judgments be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court.

[fol. 1221]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

MINUTE ENTRY OF ORDER DENYING REHEARING—September 9, 1957

The petition for rehearing on behalf of the appellants Louis Joseph Abbate and Michael Louis Falcone in the above styled and numbered cause is hereby denied.

[fol. 1225] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1226]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—December 16, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to question 2 presented by the petition for the writ which reads as follows:

"Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT

OCT 8 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. [redacted] 7

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Opinion of Court Below	1
Statement of Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	3
Statement of Facts	5
Evidence Introduced by the Government	6
Basis for Federal Jurisdiction	17
Reasons for Granting Writ	17
Conclusion	31
Appendix 1	33
Appendix 2	40

List of Authorities.

Cases.

Bartkus v. People, No. 12, Misc.	20
Boyle v. U.S., 259 Fed. 803	29
Bridges v. United States, 199 F. 2d 811	25
Clark v. U.S., 213 F. 2d 63	21
Eldredge v. U.S., 62 F. 2d 49	29
Hoag v. State, No. 61 Misc.	20
Hyde v. U.S., 225 U.S. 347	29

PAGE

Fulbright v. U.S., 91 F. 2d 210 24

Gabbard v. Commonwealth, 193 Ky. 460, 236 S.W. 942 24

Ladner v. U.S., No. 80 Misc. 20

Langer v. U.S., 76 F. 2d 817 24

Lutwak v. U.S., 334 U.S. 607 30

Marino v. U.S., 91 F. 2d 691 29

McLeroy v. State, 120 Ala. 274, 25 So. 247 24

Neal v. U.S. 102 F. 2d 643 24

Pereira v. U.S., 347 U.S. 1 21

Powers v. Commonwealth, 110 Ky. 460, 386, 61 S.W. 735 24

Ware v. U.S., 154 Fed. 577 30

Williams v. U.S., 295 Fed. 302 21

U.S. v. Anderson, 101 F. 2d 325 21

U.S. v. Beck, 118 F. 2d 178 29

U.S. v. Bollenbach, 157 F. 2d 199 22

U.S. v. Britton, 108 U.S. 199 29

U.S. v. Crimmins, 123 F. 2d 271 22

U.S. v. Cordo, 186 F. 2d 144 22

U.S. v. Rollnick, C.C.A.N.Y., 91 F. 2d 911 25

U.S. v. Sherman, 171 F. 2d 619 22

U.S. v. Smolin, 182 F. 2d 782 23

PAGE

Constitutional Provisions.

Fifth Amendment to the Constitution of the United States 20

Fourteenth Amendment to the Constitution of the United States 20

Statutes

Title 18 U.S.C. §371 3

Title 18 U.S.C. §1362 ..... 4, 17, 18

35 Stat. sec. 60, ch. 321 19

Legislative Records, Reports, etc. (43d *Cong.*)

6 Cong. Record (43d Cong.) 4207 18

6 Cong. Record (43d Cong.) 5409 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported; the unreported opinion is included herein as Appendix 1.

STATEMENT OF JURISDICTION.

The judgment of the United States Court of Appeals in this matter was entered on August 8, 1957; a petition for rehearing was filed by petitioners within the proper time, as provided for by rule of said Court of Appeals, and the order denying said petition for rehearing was entered on September 9, 1957. The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28 U. S. C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether approximately twenty circuits out of a total number of twenty four hundred circuits contained in a coaxial cable leased by the Southern Bell Telephone Company to the United States government, all maintained and repaired by the telephone company, are a means of communication operated and controlled by the United States within the meaning of Title 18 U.S.C. §1362.

2. Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States.

3. Whether the conviction of petitioners, for conspiracy to destroy a means of communication operated and controlled by the United States, may stand, where the peti-

tioners had no knowledge of the existence of such means of communication or its operation and control by the United States.

4. Whether the petitioners could be convicted of conspiracy when the evidence showed no intent as indicated by the testimony in the case, that immediately after being solicited by one of the co-defendants to destroy telephone communications of the Southern Bell Telephone Company, they immediately informed the intended victim of the conspiracy and also informed the other alleged conspirators that they would not participate in such plan. Or if assuming *arguendo* that petitioners did enter the conspiracy whether their subsequent acts constituted a withdrawal.

5. Whether evidence of supposed overt acts which were unconnected with the petitioners and which were committed after petitioners' arrest by the authorities of the State of Illinois, could be introduced in evidence against the petitioners.

STATUTES INVOLVED.

Title 18 U. S. C. §371.

"Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18 U. S. C. §1362:

"Communication lines, stations or systems.

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life and limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF FACTS.

The petitioners, Louis Joseph Abbate and Michael Louis Falcone, residents of Chicago, Illinois, were indicted by the Grand Jury of the Southern District of Mississippi, for the crime of conspiracy to violate Section 1362 of Title 18 of the United States Code, which provides a penalty for the destruction of a means of communication operated or controlled by the United States. They were jointly indicted with James Shelby a resident of Silver Springs, Maryland, and Charles Perry, a resident of Jackson, Mississippi. All four defendants were found guilty by a jury and were sentenced to the custody of the Attorney General; Abbate for three years, Falcone for one year, Shelby for three years, and Perry for two years. On appeal the United States Court of Appeals reversed the convictions of Shelby and Perry because of an inadequate cautionary instruction on the limitation of statements introduced against Abbate and Falcone, and remanded their cases for a new trial. The convictions of Abbate and Falcone were affirmed.

The indictment arose out of a strike of the Communications Workers of America against the Southern Bell Telephone Company. Shelby was an International Representative of the union and Perry was the president of the local union in Mississippi. A fifth alleged conspirator, Norman Douglas McLeod, who was not indicted, was the chief witness for the Government.

Abbate, Falcone and McLeod were solicited, in Chicago, by Shelby to dynamite certain property of the Southern Bell Telephone Company, located in the State of Mississippi. The four men met in Chicago, where Shelby gave them plans of the various installations to be destroyed and

instructions as to how to do it. After Shelby left the City of Chicago, Abbate and Falcone informed McLeod that they were withdrawing from the scheme and that they were going to inform the telephone company in Chicago, which they did.

The telephone company officials called the matter to the attention of the Chicago Police Department and thereupon the petitioners were arrested and brought to State's Attorney of Cook County, Illinois. Abbate and Falcone gave extensive information to the telephone company authorities and to the State's Attorney's office. It was because of this that the plan was brought to light and the prosecutions were instituted.

Abbate and Falcone were prosecuted in the Criminal Court of Cook County, Illinois, for conspiracy to destroy property of the Southern Bell Telephone Company, and they pleaded guilty and received sentences of not exceeding three months.

Afterwards, indictments were returned in Mississippi charging the federal offense. We take the liberty of setting forth the evidence introduced by the government at that trial. Petitioners Abbate and Falcone introduced no evidence in their own behalf.

EVIDENCE INTRODUCED BY THE GOVERNMENT.

The government's case against petitioners Abbate and Falcone rests chiefly upon the testimony of McLeod, who at the time of the trial was confined at Oklahoma State Penitentiary for armed robbery, and was not indicted as a defendant. Prior to his conviction for armed robbery in Oklahoma, (R. 24) McLeod had been convicted for grand larceny in the State of California. (R. 119). McLeod refused to testify for the government (R. 172) until he had been

assured by the attorney for the Southern Bell Telephone Company that he would not be indicted. (R. 180) Although he testified that the United States Attorney did not promise immunity to him, McLeod was not indicted.

McLeod testified that on the 18th or 19th of April, 1955, Louis Abbate called and asked him to meet him if he wanted to make some money. McLeod replied that he was interested and at 9:00 o'clock in the evening, Abbate picked him up in his car while Michael Falcone followed them in another car (R. 29), and they drove to the corner of La Salle and Madison Streets in Chicago (R. 29) where they met James Shelby and went to a tavern in the Calvert Hotel. Shelby, who was introduced as a strike director of the Southern Bell Telephone Company strike, said that the company would not negotiate with strikers and that they would have to get rough with them. He said that he was after someone to go down south and get rough with them. McLeod, who was introduced as a dynamiter (R. 38), asked Shelby how he wanted the jobs done and Shelby said he wanted the huts (sheds containing telephone installations) demolished (R. 39). Shelby gave Abbate three envelopes (exhibit 1) which he said contained the plans of the installations of the Southern Bell Telephone Company (R. 44). There was a discussion as to the amount of dynamite they would need and Abbate said that they could get plenty of stuff and Falcone said he knew where he could get some. (R. 45). Shelby said that he would pay them $500 for each hut (R. 49). McLeod, Abbate and Falcone went to Falcone's house ostensibly for the purpose of locating some powder, but were unsuccessful. (R. 53, 54).

McLeod testified that the next morning Falcone said he was unable to get any powder and that he was "backing off." (R. 54). Falcone also told McLeod that he couldn't

go, that he had too much business to take care of in Chicago (R. 55). McLeod testified that he talked to Abbate who told him that he did not know where to get the dynamite, and he was backing out (R. 55). Abbate told McLeod that he did not want to go down there and gave McLeod $125 out of the $500 he supposedly received from one Audio (R. 56).

McLeod testified that he alone obtained four cases of dynamite from a friend (R. 58), and brought them with him on the Panama Limited. He got off at Canton and came to Jackson by cab where he registered at the Annabelle Hotel as John Morton (R. 61) from St. Louis, Mo. (R. 65). McLeod testified that he did not check in at the Walthall or Edwards Hotel as directed by Shelby because he had reason to believe that he was being sold out in Chicago by Abbate (R. 65). Abbate had said to McLeod before he left for Jackson, "we'll take the plans to the company and we'll walk away and we'll let them know what exactly is taking place down there." (R. 66)

After McLeod checked in at the Annabelle Hotel on April 22nd in Jackson, Mississippi, he met Charles Perry and told him that he was sent down there by James Shelby to shoot the installations (R. 68). They put the dynamite in Perry's car and went to the Regional Director's Office of the CIO. (R. 70) McLeod told Perry that there were others supposed to have been hired but that they never showed up and that he would have to work alone (R. 71). Perry told him that he would send a girl to show him the installations. Perry introduced him to Miss Sandridge who was to pretend to be his wife, and she drove McLeod to Meridian and Forest, Mississippi, pointing out the installations which he was supposed "to shoot". (R. 74, 75).

After McLeod and Miss Sandridge returned to Jackson, Mississippi, he met James Shelby and told him that the others had backed out and were going to double-cross them

(R. 81). They went for a ride and he was shown what a "hut" looked like and they discussed dynamiting the huts (R. 85). After the ride, McLeod said he was broke and Shelby gave him $100. McLeod told Shelby that Abbate kept the plans and again said that Abbate was going to double-cross him (R. 90).

The next morning he saw Perry with R. C. George and they started for Laurel. They drove about fifteen or twenty miles to a side road where they found a truck and the bag that he had given to Perry. He poured the dynamite out of the bag and they returned to Jackson (R. 92). The following day, Shelby told him to go back to Chicago and tell Tony Audio to get the plans from Abbate. McLeod said he did not want to go back to Chicago without doing what he came down to do (R. 99). Shelby took McLeod back to Canton and gave him $50 and McLeod bought a ticket for Chicago and arrived there on the 24th of April. McLeod testified that he was mad because he was pulled off the job and had to return to Chicago (R. 105).

When McLeod returned to Chicago, he called Abbate who asked him if any of the boys wanted to knock his ears down for that double-cross (R. 108). Abbate came to McLeod's home and said he was going to return the money and that he was afraid somebody was going to put a hole in his head (R. 109). McLeod testified further that before he went to Jackson, Abbate said, "We will take the plans down and get a certain amount of money and leave the plans with them and we can walk out, walk away, and it will let them know what the union's going to do down south." (R. 113).

McLeod was arrested in Chicago upon his return from Jackson, Mississippi; his parole was later revoked and he was returned to the penitentiary (R. 114).

On cross-examination, McLeod testified that he was convicted of grand theft in 1944 or 1945 in the State of California and he was convicted of armed robbery in 1951 in the State of Oklahoma (R. 119, 120). When asked to give the name of the friend from whom he obtained the dynamite he failed to remember the name although he stated he knew him five or six years (R. 149). He stated that he bought the dynamite in 1950 and placed it in his friend's garage (R. 151) but he could not remember the name of the man from whom he obtained the dynamite in Peoria, Illinois (R. 152).

McLeod also testified on cross-examination that Dan Byrd, an attorney for the Southern Bell Telephone Company, came down to see him and asked him to become a witness against the defendants (R. 170). He had been questioned three times previously by agents of the FBI and he had denied that he was involved in this case, and had refused to become a government witness (R. 173). Byrd came back and again asked him to help the telephone company (R. 175), that without his help, the government did not have a case. McLeod testified that Byrd came down to see him at the penitentiary to see if he could get him to change his story and help the telephone company (R. 175), but McLeod refused. Byrd came back two weeks later and again asked McLeod to help him, telling him that without McLeod's help the government did not have a case (R. 177) and this time Byrd succeeded in getting a statement from McLeod (R. 177), after he told McLeod that if he made a statement he would not be indicted (R. 180).

McLeod also admitted on cross-examination that he went to Jackson, Mississippi, on his own accord and that Abbate and Falcone refused to go, saying that they did not want any part of it (R. 182).

On re-direct examination he identified the cab driver (Riley A. Pharr), who drove him from Canton (R. 200). He denied that the United States Attorney promised that he would not be indicted or prosecuted (R. 202). He testified that he changed his story from the one he gave in Chicago because they did not take care of his family (R. 206).

Riley A. Pharr, a cab driver, testified that he picked up a man in Canton who had two or three suit cases, one of them large, and brought him to Jackson.. He registered at Annabelle Hotel (R. 218).

Woodrow Friedrich testified that he is a bartender for the L & L Tavern in Chicago. On April 18th or 19th, 1955, he saw Abbate and two others whom he could not identify (R. 229).

William H. Forsythe testified that he is an investigator for the Illinois Bell Telephone Company in Chicago. On April 25th a call was made by some unknown person who offered to sell information relating to persons who were going to cause destruction to the Southern Bell Telephone property (R. 240). The caller said that they had information of the diagrams and locations of the installations that were to be destroyed (R. 241). A meeting was arranged by Garrity of the telephone company for Officer Levinson of the Chicago Police Department to meet the caller (R. 241). Forsythe saw Abbate meet Levinson, who pretended that he was Garrity, a special agent for the telephone company (R. 244). On April 26th, Abbate called again and requested them to meet him at a certain tavern. At the previous meeting, Abbate had requested $2,000 for information relating to each state. Levinson and Forsythe went to the tavern where they saw Abbate who asked Forsythe if he had the money. Forsythe reached in his pocket and

pulled out an envelope containing what he described as a "poagey roll." Forsythe asked him if he had the sketches and maps for the money and Abbate said they were in the car but refused to let Levinson accompany him to the car. Thereupon Levinson identified himself as a policeman and arrested Abbate (R. 258). Abbate identified his car for them and told them the plans were in a brown envelope in the glove compartment (R. 259). Forsythe went to Abbate's car and obtained the plans (R. 260). They took Abbate to the office of the telephone company where Abbate made a statement.

On cross-examination, Forsythe testified that a reward of $5,000 was offered leading to the arrest and conviction of anyone damaging the property of the telephone company (R. 282). He knew that telephone calls had been received around April 18th by the company offering to give information (R. 278, 284). He admitted that Abbate gave him authentic information about McLeod and the plans.

The testimony of Officer Levinson was substantially the same as that of Forsythe. Levinson testified that he and Forsythe took Abbate to the office of the Illinois Bell Telephone Co., where a statement was taken from Abbate. (R. 314). Abbate said that he received a call on or about the 15th or 16th of April, from Tony Audio who asked him if he wanted to make some money. Audio asked Abbate if he could get a couple of fellows and "Italian confetti" which is another name for dynamite. Abbate said he thought he could and Audio told him that he would receive a call within a few days. On April 19, he received a call from a person who identified himself as James Shelby, and asked Abbate to meet him at a designated place in Chicago. Abbate, Falcone and McLeod met James Shelby and drove to a tavern at the Calvert Hotel. Shelby gave

Abbate the plans and asked him if he had the man to do the job. Abbate asked for some money and Shelby said that Tony Audio would give him some money the next day. The next day, Abbate met Audio who gave him $500 of which he gave Falcone $50 and McLeod $250. There was no mention made by Abbate of any dynamite (R. 319). Abbate met McLeod after he came back from Jackson, Mississippi. McLeod told Abbate that they had sent him back because he was too hot to handle. (R. 319). Levinson then turned Abbate over to the State's Attorney's office. While there, Abbate wrote a note giving them permission to go to his home and obtain the original plans. Levinson and another officer went to Abbate's home where they obtained a brown envelope containing maps and the words "Edward Hotel or Walthall Hotel, Jackson, Mississippi." (Rec. 322).

The government introduced evidence that the destruction of the installations in question would affect the security of the United States (R. 413) and that one circuit leased by the government ran through the microwave tower described by McLeod (R. 370) and was in control of the strategic air command (R. 371).

John B. Carroll, Chief of the Central Office of the telephone company, was permitted to testify that on April 28, 1955, two huts that house amplifying equipment on the coaxial cable were damaged by an explosion (R. 504) and that ten days later another hut was demolished. (R. 511). This testimony was objected to on the grounds that appellants were arrested in Chicago and were in custody at the time of these occurrences and no longer a part of the alleged conspiracy.

Barbara Navarro testified that in the latter part of April, 1955, she copied some sheets on her typewriter for Falcone and Abbate for which they paid her $2.00.

Josephine Starnes and Leilah Sandridge testified that on April 22, 1955, they drove to Billups Station on Highway 80 where they met Perry and McLeod. Josephine Starnes got in Perry's car and Perry took McLeod over to Leilah's car and left her with him (R. 656). Jo Starnes gave her a little gold band to wear that day (R. 694). Perry introduced McLeod to her as Morton and he got in the car with her and they drove towards Meridian, Miss. Near Meridian they saw a microwave tower from the highway which McLeod said would be a good one to shoot. They stopped at another microwave tower before they got to Forest, Mississippi, and McLeod said that it would be dangerous to fool with this one because it was close to the highway (R. 705).

Willard L. Arbour, an electrical engineer employed continuously by Southern Bell Telephone Company since 1930 (R. 357, *et seq.*) testified for the government. It was established that a coaxial cable is made up of a series of many small conductors contained in eight tubes. The tubes are so arranged that they will carry many conversations. A pair of tubes is necessary to complete one circuit and will carry simultaneously six hundred telephone circuits (R. 361). These coaxial cables transverse Mississippi east and west (R. 361) and north and south from New Orleans to Memphis (R. 361). A conversation grows dim after some distance unless amplified, and for that purpose, the telephone company had established repeater stations or amplifiers along the route of these cables at intervals of five and one-half miles (R. 362).

The Strategic Air Command, the Civil Aeronautics Administration and others, by virtue of some sort of a lease arrangement with the telephone company, had the exclusive right of use of some of these circuits. When a circuit is

leased to the Government or to anyone else, it is marked at certain intervals with a color indicating to telephone employees the identity of the lessee. The telephone company designated the circuits leased to the United States with the letters "G F P", meaning "Government Full Period" (R. 375). When a circuit failed, the telephone company would be notified and would repair it (R. 378). These same facilities are available to and are used by individuals and corporations on identical terms as the Government (R. 393). The equipment is owned, controlled, repaired and in every way maintained by the telephone company (R. 389). In case of interruption of service, the telephone company notified its lessee, the United States, that such interruption was necessary just as it would notify an individual (R. 393). It was the policy of the telephone company not to interrupt service supplied either to the Government or to an individual without permission of the lessee (R. 395).

Frank Ferlic, an assistant state's attorney of Cook County, Illinois, testified that he questioned Louis Abbate on April 26, 1955. Abbate told him that he had received a telephone call from Audio on April 15, 1955. When Audio mentioned something about Italian confetti, Abbate said that he did not want any violence. Audio told him it was just to scare people and there was going to be money in it for him. Abbate told him that he would contact Falcone and McLeod, and Audio said that someone would later contact him (R. 738). Abbate received a telephone call from someone with a southern accent who told him he was the man whom Audio said would contact him. Abbate then got in touch with McLeod and Falcone and not long after that he received a telephone call from the same person who identified himself as Shelby stating that he would be standing on the corner of Madison and Dearborn Streets

in Chicago with a brown envelope in his hand (R. 741). After they picked him up, they drove to a tavern known as Calverts. Shelby told them that there was a strike in the south and that he wanted Abbate or someone else to go down and dynamite some huts. Shelby opened an envelope containing a map which he called plans and pointed out certain spots designated as red and white huts which he wanted dynamited. Shelby said that they were paying the fellows down south $200 which McLeod said was peanuts. Abbate said that he was not going down south and would only act as contact man. Before Shelby left, Abbate asked him about expenses and he was told that Audio would get in touch with him and there ought to be $500 for expenses. Abbate received $500 from Audio out of which he gave $200 to McLeod and $50 to McLeod's wife. He gave Falcone $50 and kept $200 for himself. On April 22, he picked up McLeod and took him to the IC station where he gave him the money. On the following Sunday, McLeod came back and called him up and said that Abbate was in trouble with Audio.

Ferlic further testified that Abbate told Falcone that they could make money easier by selling the plans to the telephone company (R. 753). Abbate then called the local office in Chicago and talked with a man by the name of Peck who told him to call Southern Bell. After the telephone call, he and Falcone showed the copies to a man who represented himself to be Garrity. A statement made by Falcone was substantially the same as the one made by Abbate.

On cross-examination, Mr. Ferlic testified that Abbate told him, "We thought he had some dough on him (Shelby) and we thought maybe we could make a deal either one way or the other either by promising him a lot of baloney or not going through with it." Abbate said on several

occasions that he didn't intend to go down south, and that he didn't intend to do any violence. Abbate also told him that he had advised McLeod against going down there and that he could sell the plans to the telephone company instead (R. 788). Audio when questioned, denied that he ever gave any money to Abbate or Falcone (R. 789).

BASIS FOR FEDERAL JURISDICTION.

The proceedings in the United States District Court for the Southern District of Mississippi, Jackson Division, were instituted by indictment, returned by the Grand Jury of said District against the petitioners and others, for the violation of Title 18 U. S. C. §371.

REASONS FOR GRANTING WRIT.

1. The statute in this case, §1362 of Title 18 of the United States Code presents an important question which has never before been decided by any court of appellate jurisdiction of the United States. This question is: Whether approximately twenty circuits out of a total number of twenty four hundred circuits contained in a coaxial cable leased by the Southern Bell Telephone Company to the United States government, all maintained and repaired by the telephone company, are a means of communication operated and controlled by the United States within the meaning of Title 18 U.S.C. §1362.

The testimony introduced by the government on this subject (R. 357 *et seq.*) shows that the coaxial cable in question consisted of eight copper tubes. These tubes are so constructed that each will carry six hundred communication paths in one direction and that two tubes are necessary to complete the circuit, a circuit being a single mes-

sage and return. Therefore the coaxial cable involved in this case was capable of carrying a total of twenty-four hundred circuits. A coaxial cable is a recent communication engineering development and consists of several copper tubes with a copper wire running through it. It accomplishes its task by carrying electrical impulses at varying frequencies and is constructed so that six hundred of these frequencies may be carried at once in a single direction. When the government or any other person leases a circuit from the telephone company he merely is allocated a frequency for his own use.

The evidence showed that any person could lease a circuit. All work on the cable was performed by the telephone company and the government was notified of such work as any other subscriber of the company. In short the United States was not more than a subscriber to the telephone company's services. We do not believe that the framers of Section 1362 of Title 18 of the United States Code contemplated such leased telephone circuits to fall within the terms of the statute.

This statute has little or no legislative history. Apparently no one has ever been convicted for violating it, although it first came into being in 1874 when Mr. Hunter of the Committee on Military Affairs reported a "bill (H.R. No. 3432) to protect lines of telegraph constructed or used by the United States from malicious injury and obstruction". At page 4207, Volume 6 of the Congressional Record, Mr. Hunter reported as follows:

> "The bill provides any person or persons who shall wilfully or maliciously injure or destroy any of the works or property or material of any telegraphic line constructed or owned, or in the process of construction by the United States, or that may be hereafter constructed or owned or occupied and controlled by the United States, or who shall wilfully or maliciously

> interfere in any way with the working or use of any such telegraphic line or who shall wilfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such telegraphic line, shall be deemed guilty of a misdemeanor, etc. . . .".

There was no debate. On June 23, 1874, the Senate considered this House Resolution (Volume 6, page 5409, Congressional Record, 43rd Congress, First Session). The bill was reported to the Senate without amendment, ordered to a third reading, read the third time and passed. There were no reports of committees or debate in either House on the proposed legislation.

On March 4, 1909 on the revision of the penal laws of the United States (35 Stat. Section 60, Chapter 321) there was included an amendment to this statute adding the words "telephone or cable line or system". In 1940 and 1948 radio and radio stations were added to the covering of this statute, and it has since apparently remained unchanged. In fact, but for the addition of newly discovered scientific communications apparatus, the statute has remained unchanged since its original enactment.

It seems obvious that the statute came into being at a time when the Government owned and operated telegraph lines, and there was a danger that mischievous persons might, in some wise, interfere with the operation of these lines; hence the passage of a coercive statute making such persons misdemeanants.

The absurdities which may arise from prosecutions under this statute are readily apparent. The United States, being the largest subscriber to telephone service, may be considered to "operate or control" such telephone lines as enter post offices, court houses, buildings containing offices of any of hundreds of agencies even though the office is located in a large private office building. Any destruction of such a line could be prosecuted if wilful or malicious.

The states have statutes prohibiting destruction of property and this statute may, as in this case, result in double prosecution. This Court should decide this problem arising under the statute in order that a clear interpretation of it may prevent such prosecution as are not properly within its scope.

2. This case further presents the problem, which this Court has recently recognized by its grant of Writs of Certiorari, of whether the petitioners were twice placed in jeopardy. The evidence showed that petitioners were convicted of the crime of conspiracy under the law of the State of Illinois. At that trial in Illinois the prosecution was based upon facts which were identical with those presented in the trial of the present case with the exception that in the present case evidence as to operation and control by the United States, was introduced. We do not wish to burden the court with a reiteration of the arguments presented in these cases but we wish to call the Court's attention to the following cases in which certiorari has been granted: *Bartkus, Petitioner* v. *People of the State of Illinois,* No. 12 Misc. (Facts and opinion 7 Ill. 2d 138, 130 N.E. 2d 187), *Hoag, Petitioner* v. *State of New Jersey,* No. 61 Misc. (Facts and opinion 35 N.J. Super. 555, 114 A. 2d 573; 21 N.J. 496, 122 A. 2d 628), *Ladner, Petitioner* v. *United States of America,* No. 80 Misc. (Facts and opinion, 5th Circuit, 230 F. 2d 726). Through these cases run variants of the question here presented by the petitioners: Whether a series of prosecutions, either by separate counts or separate indictments, in a State or Federal court, for crimes arising out of the same conduct or course of conduct, deny to the defendant due process of law as secured and guaranteed by the Vth and XIVth Amendments to the Constitution of the United States, and subject him to be twice placed in jeopardy in violation of the Vth Amendment to the Constitution of the United States.

We believe that the Court, in exercise of its general powers of supervision should grant this petition in order that the petitioner may benefit from the reexamination of this question of double jeopardy.

3. This case presents the question of whether the conviction of petitioners, for conspiring to destroy a means of communication operated and controlled by the United States, may stand, where the petitioners had no knowledge of the existence of such means of communication or its operation and control by the United States. An analysis of the cases of the various Courts of Appeal demonstrate a marked divergence of opinions on the question of whether in a conspiracy case such knowledge can be imputed.

The evidence presented by the government showed that Shelby solicited the petitioners to destroy property of the Southern Bell Telephone Company. There is some testimony that two of the co-defendants, Perry and Shelby, knew of the existence of telephone circuits leased to the United States, but there is no showing that this knowledge was ever imparted to the petitioners, Abbate and Falcone. The Court of Appeals said:

> "... Abbate and Falcone were bound by the knowledge of Shelby and Perry that many of the circuits to be destroyed were operated and controlled by the government. Further, the jury could well find that they conspired to stop all communications over any of the cables or facilities regardless of who operated or controlled the circuits and were bound by what would have been the natural consequences of their conspiracy."

In support of this the Court of Appeals cited *Pereira* v. *United States*, 347 U.S. 1 (1954); *Clark* v. *United States*, 213 F. 2d 63 (5 Cir. 1954); *Williams* v. *United States*, 295 Fed. 302 (5 Cir. 1923); *United States* v. *Anderson*, 101 F. 2d 325, (7 Cir. 1939). These cases are not applicable to

the present situation and the Court of Appeals erred in so applying them.

The *Pereira* case was conspiracy to violate the mail fraud act 18 U.S.C. 1341. There this Court held that it was common knowledge that checks drawn on out of town banks presented to a bank for collection are sent by mail to the drawee bank.

The *Williams* and *Anderson* cases deal with railroads and again apply the common knowledge test. In the *Williams* case it was held that it was common knowledge that railroads carry interstate commerce and therefore a conspiracy to destroy railroad equipment is a conspiracy to restrain interstate commerce. In the *Anderson* case it was held that it was common knowledge that railroads carry mail and therefore a conspiracy to destroy railroad tracks was a conspiracy to obstruct the mails.

The "Common Knowledge" test should not have been applied in this case for there is not involved in this case the conditions which were present in the "common knowledge" cases. In those cases there was involved a course of conduct which is well known, such as, that banks send checks by mail, that railroads carry interstate commerce, that railroads carry mail. In the present case there is no such well known course of conduct (*i.e.*, that telephone companies lease their circuits to the government).

The *Clark* case applies a different theory and one which is peculiar to substantive stolen property cases. That is, "that one who receives stolen property does so at his peril of their having been stolen from an interstate shipment." However, the *Clark* case applies the rule to conspiracy to violate the Stolen Property Act, thus imputing knowledge to a member of an alleged conspiracy who lacks such knowledge. This decision is in conflict with the decision of other courts of appeal.

The case is based upon five decisions of the Court of Appeals for the Second Circuit, *United States* v. *Crimmins*, 123 F. 2d 271; *United States* v. *Bollenbach*, 157 F. 2d 199; *United States* v. *Sherman*, 171 F. 2d 619; *United States* v. *Smolin*, 182 F. 2d 782; and *United States* v. *Cordo*, 186 F. 2d 144.

The *Cordo* case clearly held that the names of the consignees on the stolen cartons gave the defendants knowledge of the nature of the shipment. From that knowledge, the crime of conspiracy could be inferred.

In the *Smolin* case, again there were names and addresses of the consignees and consigners on the cartons stolen.

In the *Sherman* case the convictions of two of the defendants of conspiracy were reversed because there was no proof of the *requisite scienter*.

Bollenbach held that knowledge that the property was transported in interstate commerce was a necessary element of conspiracy to violate the Stolen Property Act and that this could not be presumed from the mere possession of stolen property recently transported in interstate commerce.

Crimmins is by far the leading case in this field of conspiracy and presents one of the clearest statements of law written on the subject of *scienter* in the crime of conspiracy.

In the *Crimmins* case the defendant was convicted of conspiracy to transport stolen securities in interstate commerce. The court said that the jury was justified in concluding that Crimmins knew that they were stolen. There was also evidence that they had been transported in interstate commerce. However, there was no evidence

to show that Crimmins knew of this aspect of the transaction.

Judge Learned Hand, in passing on the question whether Crimmins was guilty of the conspiracy, said, "But it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that each conspirator is chargeable with the acts of his fellow done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. *Langer* v. *United States*, 8 Cir., 76 F. 2d 817, 827; *Fulbright* v. *United States*, 8 Cir., 91 F. 2d 210, 213, 214; *McLeroy* v. *State*, 120 Ala. 274, 25 So. 247; *Powers* v. *Commonwealth*, 110 Ky. 386, 61 S.W. 735, 63 S.W. 976, 53 L.R.A. 245; *Gabbard* v. *Commonwealth*, 193 Ky. 460, 236 S.W. 942. *Cf. Neal* v. *United States*, 8 Cir., 102 F. 2d 643, 648. And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts. While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past."

The reasoning of Judge Hand can be applied with equal persuasion in our present case. Abbate and Falcone did

not know that the installation that Shelby wanted to destroy contained circuits leased or operated by the government.

This language of Judge Hand is clearly at variance with the language of the Court of Appeals for the Fifth Circuit, in this case, to the effect that knowledge of one conspirator may be inferred as being possessed by a co-conspirator for the purpose of determining the object of the conspiracy.

While an act of a conspirator may bind another member of the conspiracy the knowledge of one cannot be charged to another. To do so creates a crime where a crime does not exist.

Because the opinion of the Court of Appeals for the Fifth Circuit is at such variance with the decision of the other courts of appeal, and because the law was applied in a manner so at variance with the accepted rule, this question becomes a matter for this Court to decide.

4. It is our contention that the petitioners never intended to enter the alleged conspiracy as is demonstrated by their immediate disclosure to the telephone company of the plans of Shelby to destroy telephone installations to hurry a strike settlement.

The crime of conspiracy consists of a partnership agreement having crime as the partnership business done by overt acts. *United States* v. *Rollnick,* C.C.A.N.Y. 1937, 91 F. 2d 911. It requires that each have the intent to engage in the common purpose. *Bridges* v. *United States,* C.A. Cal. 1952, 199 F. 2d 811. The evidence relating to the conduct of appellants refutes the charge that they were engaged in a conspiracy as charged in the indictment.

On April 19, 1955, James Shelby solicited appellants to destroy telephone installations of the Southern Bell Tele-

phone Company. On April 20, 1955, appellants informed the officials of the telephone company of this plan. The witness, Forsythe, a special agent for the telephone company, testified that a call was made to the telephone company by someone who had information of plans to destroy telephone installations. (R. 278, 284).

McLeod testified that the day after their meeting with Shelby, Falcone and Abbate said that they were not going on with Shelby's proposal (R. 54) and that they would take the plans to the telephone company and inform them. (R. 66). McLeod testified that he went to Jackson, Mississippi, on his own accord after Abbate and Falcone refused to go, saying that they did not want any part of it. (R. 182)

Upon his arrival in Jackson, Mississippi, McLeod told Perry and Shelby that Abbate and Falcone had backed out and that he would have to work alone. (R. 71).

The court below erroneously concluded that the petitioners entered into a conspiracy with Shelby in Chicago, although the record is replete with evidence that neither petitioner intended to participate in this venture. According to this reasoning, anyone listening to a proposal to commit a crime becomes a fellow conspirator, which would necessarily include any government agent who is solicited to engage in a conspiracy but who has no intention of entering into such a pact.

The facts we have called to the attention of the court amply support our contention that the petitioners never intended to join Shelby in his proposal and immediately informed the telephone company of Shelby's intentions and plans. It is untenable to support the charge that the petitioners engaged in a conspiracy when the evidence shows that they immediately informed the telephone com-

pany of the plans to destroy their installations. Common experience tells us that men do not engage in a conspiracy and at the same time intend to disclose their participation to the persons against whom it is directed.

Let us assume *arguendo* that the petitioners were engaged in a conspiracy for one day as is contended by the government, they immediately withdrew from the conspiracy and abandoned the design charged in the indictment by calling the telephone company on the following day and informing them of the plans.

The Court below failed to correctly apply the rule relating to the withdrawal of a conspirator. The overt acts 1, 2 and 9 charged against the petitioners in the indictment merely allege that the parties met on April 19, 1955, in Chicago, Illinois; that Shelby delivered maps of telephone installations; and that on April 25th, the petitioners made copies of said plans. Overt acts 1 and 2 do not constitute overt acts in furtherance of a conspiracy, overt act 9 took place after the petitioners had informed McLeod that they would not engage in Shelby's plans and Abbate had called the telephone company to inform them of the plans for the destruction of telephone installations.

The court below in holding petitioners were engaged in the conspiracy and did not withdraw from the alleged conspiracy before an overt act was committed, based its opinion upon the conclusion that petitioners sent McLeod to Jackson, Mississippi. In arriving at this result, the court overlooked in its opinion the following facts in evidence: (1) McLeod testified that the day after Shelby met the petitioners, Falcone and Abbate, they told McLeod that they "were backing out." (R. 55). (2) On cross-examination, McLeod testified that he went to Jackson, Mississippi, of his own accord and that Abbate and Falcone

refused to go, saying that they did not want any part of it (R. 182). (3) When Abbate was questioned by the prosecutors in Chicago, he stated that he advised McLeod against going from Chicago to Jackson, Mississippi (R. 788) and that it was their intention to take Shelby's money without carrying out his proposal (R. 788). (4) Abbate told McLeod before the latter left for Jackson that he intended to take the plans furnished by Shelby to the telephone company and inform them of the proposals made by Shelby (R. 66). (5) McLeod was aware when he left Chicago that Abbate and Falcone had deserted him. McLeod testified that when he arrived in Jackson he did not register in the Hotel, to which he was directed by Shelby, because he was afraid he was being sold out in Chicago (R. 66). (6) Upon his arrival in Jackson, McLeod told Perry that there were supposed to be others hired but they never showed up and that he would have to work alone (R. 71). (7) Later in the day, McLeod met Shelby and told him that Abbate was going to double cross him (R. 90). (8) McLeod was forced to return to Chicago by Shelby and Perry, and was angry because they would not let him destroy the telephone installations (R. 105). (9) McLeod testified that when he returned to Chicago, Abbate asked him if any of the boys wanted to knock his ears down for that double cross (R. 108); and said he was going to return the money because he was afraid somebody was going to put a hole in his head (R. 109). (10) McLeod also testified that before he left for Jackson, Mississippi, Abbate told him that he planned to take the plans to the telephone company and let them know what the union intended to do in the south (R. 113). (11) The day after Shelby solicited the petitioners to destroy the telephone installations, the petitioners informed the officials of the telephone company of this plan (R. 278, 284). (12) Forsythe, a special agent

for the telephone company, testified that a call was received from someone who claimed he had information of plans to destroy telephone installations (R. 278, 284).

The petitioners did not commit an overt act which was intended to be in furtherance of the conspiracy. We submit that the court below failed to properly apply the law on the withdrawal of a conspirator prior to an overt act as stated in *Marino* v. *United States,* 91 F. 2d 691 and cases cited therein in note 15; *United States* v. *Britton,* 108 U.S. 199, *United States* v. *Beck,* 118 F. 2d 178.

5. The trial court permitted evidence of several bombings which occurred after petitioners had withdrawn from the alleged conspiracy to be introduced against the petitioners. The rule is well established that the acts of a conspirator committed after a member of the conspiracy has effectively withdrawn is not admissible as against such former conspirator.

The court below cites *Eldredge* v. *United States,* 62 F. 2d 49, in support of its opinion that the evidence of the destruction of several huts after petitioners admittedly withdrew from the conspiracy was admissible. In the *Eldredge* case, the accused advised his associates to confess. The court in passing on the question whether he withdrew from the conspiracy said, "We hold therefore, that Eldredge did not manifest an intent, in the conversation with his confederate, that the shortage be revealed and their crime confessed." The court stated the general rule of the effect of the withdrawal from a conspiracy to be that "If a member effectively withdraws from a conspiracy, he is not liable for acts of his former associates after his withdrawal. But withdrawal must be accomplished by some affirmative act *Boyle* v. *United States,* (C.C.A. 7) 259 Fed. 803." Also citing *Hyde* v. *United States,* 225 U.S. 347. This statement of the law has never been modified or

overruled. The test of withdrawal is one of assent. *Ware* v. *U. S.*, (C.C.A. 8) 154 Fed. 577. The petitioners prior to the destruction of the huts no longer were part of the alleged conspiracy for they had made a complete disclosure of the plans to the telephone company in Chicago, and the State's Attorney of Cook County, Illinois. The petitioners made known the plans of Shelby on April 20th, whereas the destruction of the huts took place on April 28th. They have met the test of withdrawal by positive affirmative action which disclosed the plans of Shelby to destroy the installations of the telephone company.

Lutwak v. *United States*, 334 U.S. 607, cited by the court of appeals below is distinguishable from our present case. There all the parties committed acts after the termination of the conspiracy to indicate that they were involved in the conspiracy. In our present case, the petitioners had withdrawn effectively from the conspiracy. It is also important to note that there is no evidence that the other defendants were involved or responsible for the bombings. The destruction of several huts after Abbate and Falcone had withdrawn from the alleged conspiracy had no relevancy to prove a conspiracy against the petitioners.

The petitioners, whose theory of the case rested on the testimony which demonstrated that they had withdrawn from the alleged conspiracy, were entitled to a ruling by the court limiting the evidence against them to acts committed prior to their withdrawal. Undoubtedly the introduction of this evidence caused the jury to be prejudiced against them and find them guilty.

It may readily be seen therefore that the Court of Appeals was gravely in error when it held that such evidence could be introduced against the petitioners. Such a holding is at great variance with the rule laid down in the other Circuits and by this Court.

CONCLUSION.

For the above reasons we believe that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

JASON ERNEST BELLOWS,
Chicago, Illinois.
On the brief.

APPENDIX 1.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16226

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY and JAMES SHELBY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Mississippi

(August 8, 1957.)

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge: The four appellants were jointly indicted for conspiring[1] to commit the offense denounced

[1] In violation of the general conspiracy statute covering a conspiracy "to commit any offense against the United States." 18 U.S.C.A. §371.

by 18 U.S.C.A. 1362,[2] that is willfully or maliciously to injure or destroy means of communication operated or controlled by the United States. The overt acts charged extended over a period of ten days, from April 19 to April 28, 1955. A strike was then going on by the Communication Workers of America, CIO, against the Southern Bell Telephone and Telegraph Company.[3]

The defendants Shelby and Perry were officers of the Communications Workers of America, Shelby being an assistant to a vice-president stationed in Washington, D. C. and Perry being President of the Jackson, Mississippi local of that union. Abbate and Falcone were residents of Chicago, Illinois. Norman D. McLeod, also named in the indictment as co-conspirator but not indicted, was on parole from the Oklahoma State Penitentiary where he had been serving a sentence for armed robbery. He turned state's evidence and was the first and perhaps the principal witness for the Government.

Prior to arraignment, Shelby and Perry filed a joint motion for a severance and separate trial, setting out that Abbate and Falcone had been convicted in the Crim-

---

[2] "§ 1362. *Communication lines, stations or systems*:

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

[3] According to the testimony, the strike began about March 14 and continued until about May 20, 1955.

inal Court of Cook County, Illinois[1] for a crime based upon the identical acts charged in this case, and that, subsequent to their arrests in Illinois, Falcone and Abbate had made lengthy confessions and statements implicating Shelby in the alleged conspiracy. Their motion for severance was overruled.

McLeod's testimony consumes nearly 200 pages of the typed record. He testified in detail to the formation of the conspiracy and to the acts of each of the conspirators. If believed by the jury, his testimony sufficed for the conviction of all four defendants. Its credibility, however, was severely attacked, not only because of its inherent weakness as the testimony of a co-conspirator, but also because of his conviction of grand theft in California and of armed robbery in Oklahoma. Further, McLeod admitted to a long career of criminal dynamiting, and had refused to testify for the Government until assured by one of the attorneys for the telephone company that "he would see to it" that McLeod was not indicted for conspiracy, and, apparently, that promise had been kept. The Government, therefore, made every effort to corroborate McLeod's testimony.

The taxicab driver who had transported McLeod from Canton, Mississippi to Jackson, Mississippi was produced, as was the Chicago bartender in whose tavern the conspiracy had been hatched. Abbate was the only conspirator other than McLeod whom the bartender could definitely identify. The Government then introduced an investigator for the Illinois Bell Telephone Company and a detective attached to the Chicago Police Department, who testified at great length concerning the statements

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[1] In their pre-sentence hearing it was brought out that they pleaded guilty and received sentences of three months.

and admissions of Abbate which did corroborate McLeod in many particulars, including operation sheets and maps showing details of the planned criminal dynamiting. Over the strenuous objections of Shelby and Perry, the testimony as to Abbate's statements and confessions was admitted for the time being as against all four defendants, with the court stating,

> "After its over, I shall tell the jury as to how to weigh the evidence. It's incomplete at this time. The case is incomplete and I, myself, I am not fully informed to instruct the jury."

This testimony was received about the middle of the week-long trial.

The Government continued to present a most impressive case. It introduced experts to prove that the Government operated and controlled most of the telephone circuits planned for destruction. It showed by former co-workers of Shelby and of Perry that they had worked on Government circuits and were familiar with their operation and control. It proved Shelby's transportation to Chicago and his registration at a hotel there under an assumed name. It proved by a stenographer that she had retyped the operation plans at the instance of Abbate and Falcone. It proved by two young women residents of Jackson, Mississippi, that, at Perry's request one of them had accompanied McLeod on a tour of inspection to familiarize himself with the installations to be dynamited, the young woman posing as his wife to allay suspicion in the event they were questioned. As an impressive closing witness, the government introduced Frank Ferlic, Esquire, Assistant State's Attorney of Chicago, Illinois, who had interviewed Abbate and Falcone. The court again declined a mistrial and separate trial as to Shelby and Perry, and declined to limit the consideration of Abbate's

and Falcone's statements to the one making the statements, stating that "* * * when it comes time to charge the jury, then, I will tell them what the law is."

At four fifteen on Friday afternoon, the last day of the trial, the court commenced its lengthy (more than forty typed pages) charge to the jury. When the charge had been more than half completed, the court finally got around to instructing the jury as follows:

> "Now, as to these two men, when they were arrested by the officers and were placed in prison, they no longer had any power to commit acts or to do things that might bind the others and for that reason, while I had some question in my mind at first, a careful examination of the law has convinced me that I should charge you that insofar as their statements to the police officers up there are concerned, and to the extent that they may involve anybody else, it is not to be considered against the other person. In other words, it can be considered against them alone and it can, even though they were out of the conspiracy, that evidence is admissible against them for the purpose of proving that they were parties to the conspiracy. In other words, they can make admissions insofar as they are concerned and it is receivable in evidence to be received along with all the other evidence to determine whether they were parties to the conspiracy."

It is not necessary now to rule on whether the district court abused its discretion in overruling the joint motion of Shelby and Perry for a trial separate from that of Abbate and Falcone,[5] for upon the plainest of principles it is clear that the judgments of conviction against them must be reversed. At the time of their statements, Ab-

[5] See **Schaffer v. United States**, 221 F. 2d 17, 19 (5th Cir. 1955).

bate and Falcone were no longer parties to the conspiracy. Permitting their statements to be received in evidence against Shelby and Perry was error which could not be cured by the mild admonition contained in the court's final charge to the jury.[6]

As against Abbate and Falcone, the case is different. They undertook to withdraw from the conspiracy and to secure a bid of some six thousand dollars from the telephone company for the maps and operation plans. They had themselves, however, already committed overt acts and had dispatched McLeod on his mission of criminal destruction. Their crime was then complete,[7] and their subsequent withdrawal could be considered only in the fixing of their punishment.

While the conspiracy was in progress, Abbate and Falcone were bound by the knowledge of Shelby and Perry that many of the circuits to be destroyed were operated and controlled by the Government. Further, the jury could well find that they conspired to stop all communications over any of the cables or facilities regardless of who operated or controlled the circuits, and were bound by what would have been the natural consequences of their conspiracy.[8]

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[6] **Delli Paoli v. United States**, 352 U.S. 232 (1957); **Lutwak v. United States**, 344 U.S. 604, 617, 618 (1953); **Krulewitch v. United States**, 336 U.S. 440, 443 (1949); **Fiswick v. United States**, 329 U.S. 211, 217 (1946); **Scarborough v. United States**, 232 F. 2d 412, 415 (5th Cir. 1956).

[7] See **United States v. Britton**, 108 U.S. 199 (1883); **United States v. Beck**, 118 F. 2d 178 (7th Cir. 1941); **Eldredge v. United States**, 62 F. 2d 449 (10th Cir. 1932).

[8] See **Pereira v. United States**, 347 U.S. 1 (1954); **Clark v. United States**, 213 F. 2d 63, 65 (5th Cir. 1954); **Williams v. United States**, 295 Fed. 302, 305 (5th Cir. 1923); **United States v. Anderson**, 101 F. 2d 325, 330 (7th Cir. 1939).

The destruction by dynamite of some of the facilities near Jackson, Mississippi occurred on April 28, two days after Abbate and Falcone had been arrested in Chicago. Such acts, however, stand upon a different footing from declarations of co-conspirators, and were relevant as additional proof of the conspiracy.[9] The facilities destroyed were among those included in the criminal plans. Shelby and Perry were still at large, and the jury could reasonably infer that they were still acting pursuant to the conspiracy.

There was ample evidence from which the jury could have found that, though the facilities were owned by the telephone company, many of the circuits were under full time operation and control by the Government, and that the telephone company could not even make repairs on such circuits without first obtaining the Government's permission. The statute, 18 U.S.C.A. §1362, Footnote 2, *supra*, does not require that the Government own the lines or means of communication, but only that they be "operated or controlled by the United States." At least six witnesses testified to facts from which the jury could find such operation or control. Since that issue was so strongly controverted, we find no reversible error in admitting the testimony of the two Army officers stressing the importance of the lines of communication to the National defense.

As to Abbate and Falcone, the judgments are affirmed, and as to Shelby and Perry, the judgments are reversed and the case remanded.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

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[9] **Lutwak v. United States** 344 U.S. 604, 617 (1953); **Eldredge v. United States**, 62 F. 2d 449, 451 (10th Cir. 1932).

APPENDIX 2.

Extract from the Minutes of August 8, 1957.

LOUIS JOSEPH ABBATE, MICHAEL LOUIS FALCONE, CHARLES G. PERRY and JAMES SHELBY,

No. 16226 versus

UNITED STATES OF AMERICA.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this court that the judgments of the said District Court as to Abbate and Falcone in this cause be, and the same are hereby, affirmed; and as to Shelby and Perry, that said judgments be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 7

LOUIS JOSEPH ABBATE and MICHAEL LOUIS FALCONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners' Reply Brief

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INDEX.

PAGE

Argument 1

Conclusion 9

Cases.

Bartkus v. Illinois, Oct. Term 1958, No. 1 7

Commonwealth of Pa. v. Nelson, 350 U.S. 497 6

Gore v. United States, 357 U.S. 386 8

Knapp v. Schweitzer, 357 U.S. 361 7

Lamar, In Re., Western Weekly Report (Supreme Court of Alberta, 1940) 5

Constitutional Provisions

United States Constitution, Amendment V. 7

Statutes

Title 18, United States Code, Chapter 65 5

62 Stat. 683 6

Misc.

5 Coke 61a 7

13 Law and Contemporary Problems 64 5

IN THE

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ARGUMENT.

The government bases its argument on the theory that separable social interests are designed to be protected by the Illinois and federal statutes under which the petitioners have been convicted. Therefore, the government reasons, both Illinois and the United States may prosecute for a single transaction.

This separable social interest doctrine formulated by the government is that in this case each indictment had an essential substantive factor not present in the other, reflecting in each instance a peculiar and separate interest of the prosecuting sovereign. The government attempts to distinguish the Illinois crime of conspiracy from the federal crime of destroying a means of communication operated or controlled by the United States by contending that the Illinois crime is directed towards the preservation of private property while the federal crime is directed toward the prevention of acts of sabotage.

This argument ignores several important aspects of the case. Both prosecutions were for conspiracy. The gist of the crime of conspiracy under the laws of both Illinois and the United States is the agreement to do an illegal act or to do a lawful act by unlawful means. Thus the social interest which each sovereignty was actually protecting was that which forbids unlawful agreements.

A second aspect of the case, which is ignored by the government in its attempt to convey the impression that separable social interests are being protected, is found in the facts of the case itself which disclose no purpose for prosecution by the government other than an effort to punish for the attempt to destroy the property of the telephone companies involved.

The petitioners were jointly indicted with James Shelby and Charles Perry. The indictment arose out of activities connected with a strike by the Communications Workers of America against the Southern Bell Telephone Company. Shelby was an International Representative of the Union and Perry was the president of the local union in Mississippi. A fifth alleged conspirator, Norman Douglas McLeod, who was not indicted, was the chief witness for the government.

Abbate, Falcone and McLeod were solicited, in Chicago, by Shelby to dynamite certain property of the Southern Bell Telephone Company, located in the State of Mississippi. The four men met in Chicago where Shelby gave them plans of the various installations to be destroyed and instructions as to how to do it. After Shelby left Chicago, Abbate and Falcone informed McLeod that they were withdrawing from the plan and that they were going to inform the telephone company in Chicago, which they did almost immediately. However, McLeod insisted on going to Mississippi to carry out Shelby's plan. The petitioners informed the telephone company officials of the plan and they called the matter to the attention of the Chicago Police Department. Thereupon the petitioners were arrested and brought to the office of the State's Attorney of Cook County, Illinois. Abbate and Falcone gave extensive information to the telephone company officials and to the State's Attorney's office. It was because of this information that the plan was brought to light and the prosecutions were instituted.

Abbate, Falcone, and Shelby were prosecuted in the Criminal Court of Cook County, Illinois, for conspiracy to destroy property of the Southern Bell Telephone Company. The petitioners pleaded guilty to the crime of conspiracy, and received sentences of short terms in the County Jail of Cook County, Illinois; the indictment as to Shelby was dismissed. Only then were indictments returned in Mississippi against the petitioners, Shelby and Perry, charging the federal offense.

The federal indictment was, we believe, returned at the instigation of the telephone companies which sought retribution through the processes of the federal courts. Our belief is strongly supported by the facts and the attendant circumstances which are in the record of the case.

The government's chief witness, McLeod, who at the time of the trial was confined at Oklahoma State Penitentiary for armed robbery, agreed to testify for the government (R. 172) after he had been assured by the attorney for the Southern Bell Telephone Company that if he would help the telephone company by testifying for the government he would not be indicted (R. 175). Although he testified that the United States Attorney did not promise immunity to him, McLeod was not indicted.

Evidence introduced by the government demonstrated that only twenty out of twenty-four hundred circuits contained in the coaxial cable which the defendants allegedly sought to destroy were operated or controlled by the United States and that these circuits were, with varying degrees of frequency, serviced by the telephone companies. Thus in order to sustain the conviction, the government maintains that it may prosecute on the basis of the conspiracy to destroy twenty circuits while the State of Illinois may proceed on the basis of the conspiracy to destroy all the circuits contained within one coaxial cable.

The facts of the case demonstrate that there was no express intent, on the part of the petitioners, to commit sabotage against the United States. The Court of Appeals was forced to fall back on the highly fictional rule that the petitioners were bound by the knowledge of the co-defendants of the presence of twenty government circuits out of twenty-four hundred in the coaxial cable, and that conspirators are deemed to have intended the natural consequences of their conspiracy (*i.e.* the destruction of the government circuits). The operation and control of the means of communication by the United States when viewed in this light is seen only as an element which gives jurisdiction to the federal court but does not create a separate social interest.

To further illustrate our position we take the liberty of quoting from an article of Professor L. B. Schwartz which appeared in 13 Law and Contemporary Problems 64, 79. Professor Schwartz says:

> "* * * Attention and controversy tend to focus on the jurisdictional problem rather than the substantive issues of criminality. Federal Jurisdiction may turn on the distinction between transporting 'with fraudulent intent' and mailing "for the purpose of executing a scheme to defraud.' Courts find themselves (making) the oft-repeated declaration that the use of the mails is the 'gist' of the offense of mail fraud, when all that is meant is that this federal jurisdictional element must, of course be alleged and proved. To regard mailing as the essence of mail fraud is like treating the localization of the offense in Pennsylvania as the gist of a Pennsylvania prosecution for larceny.
>
> * * *
>
> "Against such a background it is not surprising that a foreign court should be misled regarding the nature of our federal penal law, to an utterly impractical result. In *Re Lamar* [Western Weekly Report 471, 477 (Supreme Court of Alberta 1940)]. The Supreme Court of Alberta refused an American request for extradition for mail fraud, on the ground, among others that the offense was not within the extradition treaty. The treaty did cover fraud and false pretense, and a request by the governor of a state for Lamar's extradition would have been honored. But since the national government wanted him for an offense the gist of which was mailing, the court could find no basis for giving him up, under the principle of international extradition law that the offense must be punishable in the asylum state. Mail fraud (like other federal offenses defined by reference to particular jurisdictional features) is a unique American penological phenomenon."

The substantive crime which the conspiracy in the present case allegedly sought to accomplish is but one of a grouping of crimes in Chapter 65 of Title 18 of the United

States Code (which title is in itself positive law under Act, June 25, 1958, c. 645, 62 Stat. 683) entitled "Malicious Mischief." The statute creating the crime was originally enacted during the Civil War to prevent sabotage of telegraph lines. However, the primary use made of this section today, and especially in this case, has been to give the federal courts jurisdiction in cases of malicious mischief against telephone and similar communication companies. This crime invokes what is sometimes called the auxiliary jurisdiction of the federal courts and is for the purpose of imposing the sanctions of the federal government against those who would commit malicious mischief against telephone lines and other communication systems. As such, it may be grouped with such crimes as being a fugitive from justice, robbing a federally insured bank or savings and loan company, kidnapping or transporting a stolen car across a state line. All of which laws were enacted with the purpose in mind of complimenting and supplementing the states in the enforcement of their own laws. There are therefore no real "separable social interests" involved in this case. The element of operation of control of the means of communication by the United States is merely a jurisdictional element which the government must prove beyond all reasonable doubt just as any state prosecutor must prove beyond all reasonable doubt that the courts of his state have jurisdiction of the offense.

The government further contends that the result which we seek in this case precludes federal enforcement of federal law. However, the remedy does not lie in the subjection of the accused to two or more prosecutions. The government could have prosecuted first. Further remedy lies in the prohibition by the Congress of the enforcement of the state law enforcement program which endangers the federal program. *Commonwealth of Pa. v. Nelson,* 350 U.S. 497. If the Congress determines that a state law enforcement program constitutes a hindrance to federal law en-

forcement, it may pre-empt the field and prohibit state action.

The double prosecutions in this case constitutes a basic injustice which this court should prohibit through the use of its supervisory powers. The government attempts to dismiss our contention that this court has the supervisory powers which can be exercised to prevent double prosecutions on the theory that there is no constitutional mandate upon which the exercise of those powers may be based. We do not believe that the government's position is well taken. Unlike the petitioner in *Bartkus* v. *Illinois*, Case No. 1, October Term, 1958, we are not confronted with the problem of due process of law. Double jeopardy is expressly prohibited the federal government by the Fifth Amendment. Resolution of the problem before the Court depends on the definition of the term "double jeopardy" or as the rule is stated in the Fifth Amendment "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This provision is but a codification of the common law rule which was in effect at the time of the adoption of said amendment. The maxim as stated by Lord Coke (5 Coke 61a) is *nemo debit bis vexari pro una et eadem causa.* The key word we believe is *vexari.* This word may be translated as vexed, troubled or harassed. Traditionally, the gist of double jeopardy and the evil sought to be cured is the harassing of a defendant, the repeated prosecution in separate actions of a single person for the same transaction.

While the government and this court have spoken of the "price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments, * * *" (*Knapp* v. *Schweitzer*, 357 U.S. 361, cited on page 38 of the government's brief) we do not

believe that such a doctrine should be extended in such a manner as would subject men to double punishment and the harassment of defendants by the government, contrary to the letter and spirit of the Constitution.

The recently decided case of *Gore* v. *United States,* 357 U.S. 386, upon which the government relies in the present case is clearly distinguishable in that it is an example of non-harassing prosecution for several breaches of several statutes. There the government declined to prosecute by several indictments but placed in one indictment several counts each alleging a separate breach of statute. The defendant there was able to marshal his resources and defend himself in one action.

The present case demonstrates a harassing action on the part of the prosecution. The petitioners were forced to defend themselves not once but twice, to marshal their resources not once but twice. Indeed, the second prosecution was commenced in a district several hundred miles from the place where the petitioners reside and where the first prosecution occurred.

We submit that there is a clear and express constitutional mandate forbidding the prosecution by the federal government of a person convicted in the courts of a state for what is in reality the same crime. This court should take such action as is necessary to prevent the violation of that mandate and to establish the proper standards for the enforcement of the federal criminal law in the federal courts. (*McNabb* v. *United States,* 318, U.S. 313, 341)

CONCLUSION.

For the above and foregoing reasons and for the reasons advanced in the Brief of Petitioners, it is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit in this cause be reversed.

Respectfully submitted,

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On the Brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. [redacted] 7

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	5
Argument	7
A. Application of the concepts of double jeopardy to successive prosecutions by different nations.	7
B. Early American treatment of successive prosecutions by two nations or states.	9
C. The doctrine of the *Lanza* case.	12
D. The Court under its supervisory power over the administration of justice may refuse to extend the "two sovereignties" theory to the area of double prosecutions.	16
E. The petitioners were twice placed in jeopardy by successive prosecutions for a single course of conduct.	22
Conclusion	24

PAGE

List of Authorities

Cases.

Barron v. Baltimore, 7 Pet. 243 11

Bartkus v. Illinois, No. 39 this term 7

Beak v. Thyrwhit, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1688) 8

Blockburger v. United States, 284 U.S. 299, 304 22

Ciucci v. Illinois, No. 157 this term 7

Commonwealth v. Nelson, 350 U. S. 497 13

Cross v. North Carolina, 132 U.S. 131 12

Crossley v. California, 168 U.S. 640 13

Ex Parte Siebold, 100 U.S. 371 12

Fox v. Ohio, 5 How. 410 12

Gilbert v. Minnesota, 254 U.S. 325 13

Hoag v. New Jersey, No. 40 this term 7

Houston v. Moore, 5 Wheat. 1 (1820) 10

Ladner v. United States, No. 41 this term 7

McKelvey v. United States, 260 U.S. 353 13

McNabb v. United States, 318 U.S. 332 21

Moore v. Illinois, 14 How. 13 12

Pettibone v. United States, 148 U.S. 197 ..... 12, 13

Rea v. United States, 350 U.S. 214 21

Screws v. United States, 325 U.S. at page 160 13

Southern Ry. Co. v. R.R. Commission of Indiana, 236 U.S. 439 13

State v. Antonio, 3 Brev. (S.C. Law) 562 (1816) 10

State v. Randall, 2 Aik. 89, 100, (Vt. 1827) 11

PAGE

The King v. Hutchinson, (unreported) 8

The King v. Roche, 1 Leach 134, 135 n. a, 168 Eng. Rep. 169 (K.B. 1775) 8

The King v. Thomas, 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662) 7

United States v. Cruikshank, 92 U.S. 542 12

United States v. Lanza, 260 U.S. 377 12

United States v. Marigold, 9 How. 560 12

United States v. The Pirates, 5 Wheat. 184, 197 10

Statutes and Constitution

Const. United States, Amendment 5 ..... 3, 12

18 U.S.C. §371 3

18 U.S.C. §471 15

18 U.S.C. §1112 15

18 U.S.C. §1362 ..... 3, 23

18 U.S.C. §2113(d) 15

18 U.S.C. §2117 15

18 U.S.C. §2315 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 84 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 139 ..... 4, 22

PAGE

Ill. Rev. Stat. (1957) Ch. 38, sec. 278 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 362 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 363 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 364 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 492 15

Ill. Rev. Stat. (1957) Ch. 38, sec. 501 15

26 Hen. 8, C.6, Sec. 6, 4 Stat. at Lg. 328 (1534) 7

27 Hen. 8 7

Miscellaneous

A. L. I., Model Penal Code, Tentative Draft No. 5, page 61 16

A. L. I., Model Penal Code, Tentative Draft No. 5, Section 1.11 ..... 16, 17, 23

1 Annals of Congress, col. 782 (reprint 753) 11

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De Martens—*Traite' de Droit International* (3d Ed. 1887) tom III, 119 9

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Successive Prosecutions Based on the Same Evidence as Double Jeopardy, 40 Yale Law Journal 462 22

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

NO. 534

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Petitioners

Petitioners, Louis Joseph Abbate and Michael Louis Falcone, were convicted in the United States District Court for the Southern District of Mississippi, Jackson Division, of the crime of conspiracy to violate Section 1362 of Title 18 of the United States Code. The United States Court of Appeals for the Fifth Circuit affirmed their convictions. The petitioners brought their petition in this Court for a writ of certiorari claiming a violation of their right not to be twice placed in jeopardy for the same offense under the Fifth Amendment to the Constitution of the United States;

in that they were tried, convicted and sentenced in the courts of the United States for the same act for which they had been previously indicted, pled guilty to and sentenced in the courts of the State of Illinois. This Court granted certiorari. The petitioners pray that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

OPINION BELOW.

The opinion of the United States Court of Appeals is reported in 247 F. 2d 410.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on August 8, 1957, and a petition for rehearing was denied on September 9, 1957. The petition for a writ of certiorari was filed on October 8, 1957, and this Court granted the petition on December 16, 1957. The jurisdiction of this Court is invoked under Title 28 United States Code Section 1254(1).

QUESTION PRESENTED.

Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States.

STATUTES INVOLVED

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

Title 18 U. S. C. §371.

"Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18 U. S. C. §1362:

"Communication lines, stations or systems.

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or malicious-

ly interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Illinois Revised Statutes (1957) Chapter 38 Section 139 [Conspiracy]:

"If any two or more persons conspire or agree together, * * * with the fraudulent or malicious intent wrongfully and wickedly to injure * * * property of another, or to commit any felony, they shall be deemed guilty of a conspiracy; * * * and every person convicted of conspiracy at common law, shall be fined not exceeding $2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary."

STATEMENT.*

The petitioners, Louis Joseph Abbate and Michael Louis Falcone, residents of Chicago, Illinois, were indicted by the Grand Jury of the Southern District of Mississippi, for the crime of conspiracy to violate Section 1362 of Title 18 of the United States Code, which provides a penalty for the destruction of a means of communication operated or controlled by the United States. (R. 2) They were jointly indicted with James Shelby, a resident of Silver Springs, Maryland, and Charles Perry, a resident of Jackson, Mississippi. (R. 39) All four defendants were found guilty by a jury and were sentenced to the custody of the Attorney General; Abbate for three years, Falcone for one year, Shelby for three years, and Perry for two years. (R. 34, 7r. 1124-1133) On appeal the United States Court of Appeals reversed the convictions of Shelby and Perry because of an inadequate cautionary instruction on the limitation of statements introduced against Abbate and Falcone, and remanded their cases for a new trial. The convictions of Abbate and Falcone were affirmed. (R. 43)

The indictment arose out of a strike of the Communications Workers of America against the Southern Bell Telephone Company. Shelby was an official of the international union and Perry was the president of the local union in Mississippi. A fifth alleged conspirator, Norman Douglas McLeod, who was not indicted, was the chief witness for the Government. (R. 38, 39)

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* The letter "R" refers to the printed record. The letters "Tr" refer to the transcript of the record filed in this case. Some matters from the transcript are set forth in the statement in order to give the Court a more adequate picture of the case as a whole, than may be derived from the printed record. These matters are not, however, necessary for the limited question before the Court, and, therefore they were not printed.

McLeod testified that an attorney for the Southern Bell Telephone Company came to see him at the Oklahoma State Penitentiary and asked him to become a witness against the defendant. He had been questioned several times previously by agents of the FBI and had denied that he was involved in the case and had refused to become a Government witness. The attorney told him that if he would help the telephone company by testifying for the Government, he would not be indicted. (R. 39, Tr. 170-180)

Abbate, Falcone and McLeod were solicited, in Chicago, by Shelby to dynamite certain property of the Southern Bell Telephone Company, located in the State of Mississippi. (R. 21-23) The four men met in Chicago, where Shelby gave them plans of the various installations to be destroyed and instructions as to how to do it. (R. 23) After Shelby left the City of Chicago, Abbate and Falcone informed McLeod that they were withdrawing from the scheme and that they were going to inform the telephone company in Chicago, which they did. (Tr. 54, 55)

The telephone company officials called the matter to the attention of the Chicago Police Department and thereupon the petitioners were arrested and brought to the office of the State's Attorney of Cook County, Illinois. (Tr. 244, 258, R. 16) Abbate and Falcone gave extensive information to the telephone company authorities and to the State's Attorney's office. It was because of this that the plan was brought to light and the prosecutions were instituted.

Abbate and Falcone were prosecuted in the Criminal Court of Cook County, Illinois, for conspiracy to destroy property of the Southern Bell Telephone Company, and they pleaded guilty and received sentences of not exceeding three months. (R, 5-15, 32, 33, 39) Afterwards, indictments were returned in Mississippi charging the Federal offense.

ARGUMENT.

The problem of double jeopardy has been before this Court recently in several cases; *Hoag* v. *New Jersey*, No. 40 this term; *Ladner* v. *United States*, No. 41 this term; *Ciucci* v. *Illinois*, No. 157 this term; and *Bartkus* v. *Illinois*, No. 39 this term. The *Bartkus* case which is closest to our problem was ably presented by Mr. Walter Fisher of Chicago, and we have used some of the same material. However, we have tried to avoid repetition of his exhaustive analysis of the material. The problem before this Court in the present case is whether a person may be tried, convicted and sentenced in the Federal Courts for the same conduct for which he had been previously convicted and sentenced in a state court.

A. Application of the concepts of double jeopardy to successive prosecutions by different nations.

The concept of double jeopardy in the Common Law was first applied in the English courts to prosecutions by different nations over a century before the American Revolution. The first case in which the subject arose, *The King* v. *Thomas*, 1 Sid 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662), concerned a prosecution for murder under a 1534 statute, 26 Hen. 8,c. 6, sec. 6, 4 Stat. at Lg. 328 (1534), which provided that the neighboring English county had jurisdiction over felonies committed in Wales. The defendant who had been acquitted by the Welsh tribunal contended that by 27 Hen. 8 "Wales are to have the same immunities as English born, who on acquittal cannot be tried again." The case was referred to the King's Bench by the assize court and it was resolved that the defendant should be discharged since "*autrefois acquit in les Marches de Gales est bone plea icy in Angleterre*". (Reporters' headnote 1 Sid. 179.)

The next and the leading case, *The King* v. *Hutchinson*, was unreported except for references to it in the reports of other cases. See *The King* v. *Roche*, 1 Leach 134, 135 n. a, 168 Eng. Rep. 169 (K.B. 1775) and *Beak* v. *Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1688).

The facts as they come to us from the reports of other cases indicate that Hutchinson killed a man by the name of Colson in Portugal and was acquitted there of the Portugese equivalent of murder. Upon his return to England he was apprehended and committed to Newgate. (3 Keb. 785, 84 Eng. Rep. (K.B. 1678) reports the denial of bail.) He was brought before the King's Bench by Habeas Corpus and produced an exemplification of the record of acquittal in Portgual. The cause was referred to the consideration of the Judges who all agreed that, having been acquitted of the charge under the Portugese law, he could not be tried again for it in England.

In *Roche's* case, 1 Leach 134, 168 Eng. Rep. 169 (K.B. 1775), the facts are similar to those of *Hutchinson's* case. Roche was indicted for the murder of one Ferguson at the Cape of Good Hope. He pleaded *autrefois acquit* before Olaff Martini Bergh, provincial Fiscal of the Dutch Supreme Court of Criminal Jurisprudence there, and he also pleaded not guilty. The prosecutor requested that the jury be charged upon both issues but the court refused saying that doing so "would lead to this absurdity, that being charged with both, they would be obliged to find upon both; and yet if the first finding was for the prisoner, they could not go to the second because that finding would be a bar." *The King* v. *Roche*, 1 Leach 134, 135.

In addition to these English precedents we find that on the continent the Roman maxim of *non bis in idem* was applied to a second prosecution and that the first court acquiring jurisdiction held it exclusively and further pro-

secution in the Courts of nations having concurrent jurisdiction was barred. Pradier—Fode're', Droit International Public, Europe'en et Americain, (1887) tom III, 1073-1074 De Martens, Traite' de Droit International (3d Ed. 1887) tom III, 119.

It is true that the cases cited above concern themselves with the plea of *autrefois acquit,* however, the same rulings should logically apply to the plea of *autrefois convict.* The lack of cases wherein the plea of *autrefois convict* was raised may be assumed to have arisen from the fact that at that period in history the penalty for most if not all felonies was hanging, the execution of which sentence effectively barred any further prosecutions. There is no reason to doubt that had the case arisen where the first conviction was had in a country other than England the point would be well pleaded in a prosecution in England.

B. Early American treatment of successive prosecutions by two nations or states.

There seems to be little doubt that at the time of the American revolution and the early days under the Constitution that a trial in a court of another nation or state would bar a prosecution in another nation or state.

In the Declaration of Independence one finds the complaint that the king had "combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended Legislation:

"For quartering large bodies of armed troops among us:

"For protecting them, by a mock trial, from punishment for any Murders which they should commit on the Inhabitants of these States:"

In *State* v. *Antonio*, 3 Brev. (S.C. Law) 562 (1816) we find this language:

> "As to the second objection, 'A man may be twice tried', this could not possibly happen: First, because it is the established *comitas gentium*, and it is not infrequently brought into practice to discharge one accused of a crime, who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties."

This from the state which was the leader of the "State's Rights" group, and which would lead the secessionist states out of the Union.

The next case of consequence in the United States is *Houston* v. *Moore*, 5 Wheat. 1 (1820), there we find Mr. Justice Washington saying:

"To subject [a defendant] to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is to my apprehension, something very much like oppression, if not worse."

Mr. Justice Johnson in *United States* v. *The Pirates*, 5 Wheat. 184, 197, in reply to questions certified by the District Court, said that "there can be no doubt that the plea of *autrefois acquit* [by defendants charged with piracy] would be good, in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state . . ." He then went on to make the distinction between piracy and murder and stated that the plea of *autrefois acquit* would not be good in a murder prosecution in Great Britain. This however is not the case as we pointed out above.

In another early case, *State* v. *Randall*, 2 Aik. 89, 100, (Vt. 1827) we see in the opinion of the court:

> "[T]here is urged upon the court the hardship, and even absurdity, that a man should be liable to be arraigned before two distinct tribunals, for the same offense. The difficulty in this, like other concurrent jurisdictions, is rather imaginary than real. The court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a decision in one court will bar any further prosecution for the same offense, in that of any other court."

In each of these cases the question of double jeopardy was not before the various courts except in argument of the defendants that they could not be tried the first time because they might be tried a second time for the same offense. The unsoundness of this argument is apparent and we have no quarrel with the reasoning of these courts, which overruled it. Nevertheless the cases are important for their treatment of the double jeopardy question.

While discussing the early American decisions on the question of successive prosecutions for the same offense, it is interesting to note that when the First Congress was drafting the Bill of Rights a proposal was introduced which would have amended the Fifth Amendment, causing it to bar only second prosecutions for "the same offense by any law of the United States." (1 Annals of Congress, col. 782 [reprint 753].) This proposal was not adopted.

Thus, even if one accepts the doctrine of *Barron* v. *Baltimore*, 7 Pet. 243, that the first eight amendments to the Constitution do not apply to the states, the fact that the proposal did not carry indicates that it was intended that the Federal government is bound by a state prosecution and cannot try the accused a second time for the same offense.

C. The doctrine of the Lanza case.

This court decided the question of successive prosecutions first by a state and then by the Federal Government in *United States* v. *Lanza*, 260 U.S. 377. Speaking for the Court, Mr. Chief Justice Taft stated:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all . . . the first eight amendments, applies only to proceedings by the Federal Government, *Barron* v. *Baltimore*, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and is not double jeopardy."

This doctrine, stemming from what the Court stated was the concurrent jurisdiction of both the states and the Federal Government, was said to have been "supported by a long line of decisions by this Court." These cases are: *Fox* v. *Ohio*, 5 How. 410; *United States Marigold*, 9 How. 560; *Moore* v. *Illinois*, 14 How. 13; *United States* v. *Cruikshank*, 92 U.S. 542; *Ex Parte Siebold*, 100 U.S. 371; *Cross* v. *North Carolina*, 132 U.S. 131; *Pettibone* v. *United States*, 148 U.S. 197; *Crossley* v. *California*, 168 U.S. 640; *Southern Ry. Co.* v. *R.R. Commission of Indiana*, 236 U.S. 439; *Gilbert* v. *Minnesota*, 254 U.S. 325; and *McKelvey* v. *United States*, 260 U.S. 353. An analysis, however, shows that the decisions cited by the Court to sustain the theory that

a single act may be successively punished by the states and the Federal government does not bear out this contention. The cases deal only with the right of the states and the Federal government to enact legislation within the same area. They do not hold that the states or the Federal government may punish after the other has punished. Any language which these decisions might contain to this effect is only dicta.

A statement in the *Lanza* case which bears careful scrutiny is that which states that the effect of barring a Federal prosecution for the same offense as was prosecuted in the state courts, under State legislation which called for only nominal punishment, would cause "a race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution . . ." That this reasoning is not valid is apparent. If the Congress decides that the Federal interest is predominant, it may, by appropriate legislation pre-empt the field and thus bar any state prosecution. *Commonwealth* v. *Nelson*, 350 U. S. 497. This reasoning also assumes that the state law provides a lesser penalty. For the purposes of the present case this assumption is unwarranted. The statute of the State of Illinois under which the petitioners were prosecuted contains the same penalty as that provided by the Federal statute. (See pages 3 and 4 of this brief for the text of these statutes.)

The fear of "a race of offenders" to state courts further presupposes that the states are unequipped or cannot be relied upon to carry out the prosecutions; or that the nominal state penalties are inadequate. As for the first of these suppositions we wish to cite the following from the dissenting opinion in *Screws* v. *United States*, 325 U.S. at page 160:

> "We are told local authorities cannot be relied upon for courageous and prompt action, that often they have personal or political reasons for refusing to prosecute. If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility. It is not an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility."

In answer to the assumption that the penalties provided by the states are inadequate, we can only say that there is no way of measuring the wisdom of the men who constitute the Congress of the United States and comparing it with that of the men who constitute the State legislatures.

We point to the following comparisons between the Federal Criminal Code and the Illinois Criminal Code for certain representative crimes:

UNITED STATES	ILLINOIS
Robbery of a bank while armed with a dangerous weapon. 18 U.S.C. 2113(d). 15 years.	Robbery while armed with a dangerous weapon. Ill. Rev. Stat. (1957) Ch. 38, sec. 501. 1 year to life.
Breaking or entering a railroad car with intent to commit larceny. 18 U.S.C. 2117. 10 years.	Breaking and entering a railroad car with intent to commit larceny. Ill. Rev. Stat. (1957) Ch. 38, sec. 84. 1 year to life.
Manslaughter, voluntary. 18 U.S.C. 1112. 10 years.	Manslaughter, voluntary. Ill. Rev. Stat. (1957) Ch. 38, sec. 362, 364. 1 year to 14 years.
Manslaughter, involuntary. 18 U.S.C. 1112. 3 years.	Manslaughter, involuntary. Ill. Rev. Stat. (1957) Ch. 38, sec. 363, 364. 1 year to 10 years.
Receiving goods etc. from an interstate shipment. 18 U.S.C. 2315. 10 years.	Receiving stolen property. Ill. Rev. Stat. (1957) Ch. 38, sec. 492. 1 year to 10 years.
Counterfeiting obligation of the United States. 18 U.S.C. 471. 15 years.	Counterfeiting public securities, bank bills, etc. Ill. Rev. Stat. (1957) Ch. 38, sec. 278. 1 year to 20 years.

The above list is not meant to be comprehensive nor do we wish to imply that all crimes are punished more severely in Illinois than by the United States. We do wish to show that many serious crimes are dealt with as severely or more severely by Illinois than by the United States. Several of the above crimes, such as counterfeit-

ing and robbery of a bank insured by the Federal Government, are crimes with which the United States is peculiarly concerned. Yet, if prosecuted by the State of Illinois, one may be sentenced to a much longer term in the state penitentiary. It is indeed the unusual case where the person committing a crime which may be punished by both the Federal Government and a state could receive an appreciably lower maximum sentence in a state court. The "race" to the state courts is a phenomenon which is not likely to occur.

We submit that the cases cited in the *Lanza* case do not support the decision of the Court, nor are the practical considerations advanced therein sound.

D. The Court under its supervisory power over the administration of justice may refuse to extend the "two sovereignties" theory to the area of double prosecutions.

It is abhorrent to our concept of justice that one person may be tried and convicted and punished for a certain course of conduct and then tried, convicted and punished a second time by a second government for the same course of conduct.

The question raised in this case is not new nor is the relief for which we are asking novel. The following states have enacted legislation prohibiting prosecution after conviction or acquittal in the courts of another state or foreign country: Arizona, California, Idaho, Indiana, Minnesota, Mississippi, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wisconsin. (See A. L. I., Model Penal Code, Tentative Draft No. 5, page 61.) The American Law Institute has proposed a similar provision in its tentative Model Penal Code. (A. L. I. Model Penal Code,

Tentative Draft No. 5, Section 1.11.) This provision is as follows:

> "When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:
>
> (1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.09 and the subsequent prosecution is based on:
>
> (a) the same conduct; or
>
> (b) the same series of acts or omissions, unless the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other or the second offense was not consummated when the former prosecution was initiated; or
>
> (2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted."

The above draft is the result of long and careful research by eminent scholars interested in proper legislation in the field of criminal law. The fact that this is legislation and not court decision is not important for this discussion. It demonstrates that legislatures and prominent lawyers agree that a prosecution in one jurisdiction should bar a subsequent prosecution, for the same conduct, in another jurisdiction.

The Federal government may not prosecute a man twice for the same offense and most states by their constitutions prohibit the punishment of an individual twice for the same offense. It is repugnant to the concepts of justice of our civilization that a man be punished twice for the same offense. The federal theory of dual sovereignty in no way lessens this repugnance and under no accepted theory of the purposes of penal legislation is it removed.

One purpose of penal statutes is to prevent certain acts which are considered inimical to the interests of society or the sovereign. A second reason for the existence of penal statutes is the obtaining of retribution by punishment from those who have been guilty of this conduct. A third is the rehabilitation of the offender. Do any of these reasons for the existence of penal legislation require double prosecution and conviction?

If a certain course of conduct is not considered to be in the best interests of the society, it is not more prohibited if both the state and Federal governments enact the prohibiting legislation.

If one accepts the primitive theory of retributive punishment that each of the wronged are entitled to inflict that punishment and thus relieve the felt need for retribution occasioned by that wrong, then double punishments are called for. Our civilization has long since, in theory at least, discarded this purpose of penal legislation.

If one accepts a more sophisticated theory of punishment, that it is for the purpose of expiating the wrong by the doing of penance (hence the word penitentiary), must the wrongdoer make his penance twice? There is no need for this, and the problem might arise that the roles be-

come transposed, the person convicted might feel himself more wronged by the double punishment than he would feel that society has been wronged by his action. Then the original victim, society, is the oppressor and the wrongdoer becomes the victim of the oppression.

If one accepts the rehabilitation theory of criminal law, again it is seen that double convictions are not in keeping with this theory, unless one is willing to say that the second conviction will make the wrongdoer more rehabilitated than he was after the first conviction. Here again it may be said that the second conviction will not only not cause further rehabilitation, but will have just the opposite effect, by causing the person convicted to believe himself to have been wronged by society. Double punishment might also cause a large segment of society to believe that the infliction of the second punishment is too severe and therefore unjust.

N. S. Timasheff, writing for the Journal of the American Institute of Criminal Law and Criminology (Vol. 28, pages 396, 401) says this:

> ". . . If repression becomes obviously too severe as compared with that demanded by the socio-ethical evaluations punishment does not result in reinforcing the ethical group conviction, but, on the contrary, it produces collective sentiments which rather undermine it: offenders are considered 'victims' and governmental agents applying punishment tyrants." (Timasheff, N.S., *The Retributive Structure of Punishment*, 28 *Journal of the American Institute of Criminal Law and Criminology* 70)

Mr. Justice Clark (then the Attorney General) writing for the Iowa Law Review (Vol. 31, page 191) had this to say:

> "The record clearly demonstrates that severe punishment has contributed little as a deterrent to crime. Such punishment has failed to impress either the offender who underwent the punishment or the public, the ultimate sufferer. This suggests the familiar classical instance, extreme though it is, about Nineteenth Century England when the penalty for a pick-pocket was death by hanging. Reforms urged upon Parliament failed to take hold until it was discovered that the public had to be protected against having their pockets picked while witnessing the execution of the pick-pocket on the scaffold in the public square.
>
> "The principal that dominated criminal administration for centuries is described by the scholars as *lex talionis*: Man had sinned—he must pay with an equal amount of retributive punishment. It was measured in the amputation of hands, the splitting of ears, 'doing time' in dark, vermin-infested dungeons, in wall shackles, on the wheel and the rack, by public floggings and in solitary confinement.
>
> "Over the years, however, man's slow enlightenment gave to him a better understanding of the causes of human behavior and his humanitarianism came to challenge the old principles of retributive punishment. We now realize that harsh punishment does not protect society or prevent the offender from again engaging in crime." (Clark, Tom C., Forward: *A Symposium in Fitting the Punishment to the Criminal*, 31 *Iowa Law Review* 191)

The foregoing discussion is intended to show that the infliction of double punishments is not conducive to the proper administration of criminal justice. In fact it may, ultimately, do great harm to that administration.

While recognizing the existence of a dual sovereignty system, we believe that there are certain areas in which a rigorous application of the theory is contrary to the concepts of justice. One of these areas is double jeopardy. The Court, under its power to supervise the administration of criminal justice, may prohibit the Federal Courts from punishing one already punished by the state courts for the same offense.

In a recently decided case, this Court held, under its powers to supervise Federal law enforcement, that a Federal agent may be enjoined from testifying in a state court, where his testimony would be based upon an illegal search and seizure arising from abuse of process of a Federal Court, *i.e.* a search warrant issued by a United States Commissioner. *Rea* v. *United States,* 350 U.S. 214. (See also *McNabb* v. *United States,* 318 U.S. 332) We are not asking the Court to do more in the present case than it did in the *Rea* case. The *Rea* case resulted in this court's supervising law enforcement activities as such. In the present case we only ask the Court to supervise the District Courts.

The dual sovereignty theory should not be extended to areas in which its application causes a violation of basic concepts of justice. To so apply this theory leaves open the large area of concurrent jurisdiction in which defendants may not avail themselves of the basic right not to be tried twice for the same offense. This area promises to become even larger as Congress occupies new fields already occupied by the State.

We are asking the Court to do no more than to apply what has always been the common law rule as to successive prosecutions by different sovereignties for the same conduct. Under this doctrine, the sovereignty of the states would in no wise be impaired and the federal structure would remain as before.

E. The petitioners were twice placed in jeopardy by successive prosecutions for a single course of conduct.

What constitutes joepardy is a question which has long troubled the courts of the states and the Federal courts. "The possibility of splitting what appears to be a single criminal transaction into various component offenses, when combined with the prolific creation of new statutory offenses, tends to render the determination of identity of criminal offenses with respect to a plea of double jeopardy increasingly difficult." Successive Prosecutions Based on the Same Evidence as Double Jeopardy, 40 Yale Law Journal 462. The rule adhered to in the courts of the United States was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 when the Court said:

> ". . . The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not . . ."

In the present case the petitioners were indicted in Illinois for the crime of conspiracy and also in the Federal court for the crime of conspiracy. We have set forth these statutes on pages 3 and 4 of this brief. The Illinois statute provides that two or more persons who conspire or agree together with the fraudulent or malicious intent wrongfully and wickedly to injure the property of another, and every person convicted of conspiracy at common law shall be fined and imprisoned as provided for by the statute. Ill. Rev. Stat. (1957) Ch. 38, sec. 139. The Federal statute provides that if two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined and imprisoned as provided. In the present prose-

cution the offense against the United States was that defined by 18 U.S.C. 1362, the destroying or injuring a means of communication operated or controlled by the United States.

The prosecution in Illinois was for conspiracy to destroy the property of the Southern Bell Telephone Company. The evidence at the trial in the District Court of the United States showed that the property of the Southern Bell Telephone Company and the means of communication operated or controlled by the United States were essentially the same. The testimony of Mr. Frank Furlic [*sic*] the Assistant State's Attorney of Cook County, Illinois, (R. 15 *et seq.*) and the testimony of McLeod the chief witness for the government who testified that the attorney for the telephone company asked him to help the company by testifying for the government, (R. 39, Tr. 170-180) shows that the crime punished by the Illinois court was the same transaction as the crime punished by the United States Court.

We suggest that the American Law Institute's method of resolving this problem adequately and effectively covers the situation. (A.L.I. Model Penal Code, Tentative Draft No. 5, section 1.11. The A. L. I. test is that the prior acquittal or conviction be based on: "(a) the same conduct; or (b) the same series of acts or omissions, unless the offense of which the defendant was formerly convicted or acquitted and the offenses for which he is subsequently prosecuted each requires proof of a fact not required by the other or the second offense was not consummated when the former prosecution was initiated . . ."

This test is wholly applicable to the present case and provides protection against the peril of double trial as well as double punishment, the narrow issue of this cause. Following the A. L. I. test, which is really the *Blockburger*

test, laid down by this Court, modified to meet the situation not contemplated by *Blockburger*, the second prosecution in this case which charged the same conduct as in the first (Illinois) prosecution, constitutes a violation of petitioners' right not to be twice placed in jeopardy.

CONCLUSION.

For the above and foregoing reasons it is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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On the brief.

SUPREME COURT, U.S.
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. [redacted]7

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 534

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The government's statement of the case is for the most part an incomplete repetition of petitioners' statement of the case. It also contains a number of unwarranted conclusions and recitals of the evidence taken out of context to support the government's position that the petitioners were engaged in a conspiracy.

It is stated that Abbate refused to go to Jackson, Mississippi, because it was too dangerous. However, the government omits to state that Abbate told McLeod the

day after Shelby made the proposal to them that he had "backed out" of this proposed venture (R. 54, 55) and that the petitioners were going to inform the telephone company of Shelby's plan.

The government also omits to state that under the questioning of the court, McLeod testified that Abbate said. "You take my advice and don't go down there yourself, we can take these plans and offer them to the company for a certain amount of money, for a large sum of money, then we can walk away and leave them the plans. Then they will know what to expect down south." (R. 57)

The government omits to state that McLeod told Perry in Jackson, Mississippi, that he would have to work alone (R. 71), and when he later met Shelby, he told him "these other guys had backed out and kept the money and he was going to double cross us." (R. 81)

The government does not completely state the conversation between McLeod and Abbate after the former was forced by Shelby to return to Chicago. The government's statement of the case reads as follows: "Abbate was anxious to know what Shelby thought about his failure to come south." This is a watered down version of the conversation between McLeod and Abbate. Actually, Abbate told McLeod that he was afraid he would be shot because he informed on them. The record shows that Abbate asked McLeod "if any of the boys wanted to knock his ears down for that double cross" (R. 108) and Abbate also said he was going to return the money because he was afraid somebody was going to put a hole in his head (R. 109), a statement not likely to be made by one engaged in a conspiracy.

1. The government contends that the circuits used by the government are means of communication operated and controlled by the United States for the reasons that they

were marked, closed circuits in operation twenty-four hours a day and that the telephone company could not make any repairs without permission of the government. An analysis of the cross examination of the government's witness, Willard L. Arbour, discloses that the government's use of a circuit is not materially different from that of the ordinary subscriber. The markings are in the test rooms of the telephone company where the paths to the various military bases are marked (R. 395). It is marked to alert the employees of the telephone company that they are security circuits (R. 395) and that the employees are not to listen in or interrupt the service (R. 396). The witness admitted that a private subscriber could receive the same service except for the government marking (R. 397). The government relies on the testimony of the witness, Arbour, that the circuits could not be repaired without the permission of the government. An examination of his testimony will disclose that permission was not actually required. It appears from the evidence that when the government had circuit trouble, the telephone company would be notified, not unlike the case of a private subscriber. The telephone company ordinarily would not be aware of circuit trouble without being informed of this condition. It was, therefore, not a matter of securing permission to make repairs but one of giving notice to the telephone company of circuit trouble which would cause the telephone company to make repairs.

We take the liberty of showing that the testimony of Arbour indicates that he confused "permission" with receiving notice from the government of circuit trouble. He testified as follows:

> "Q. * * * Can any of these circuits be repaired by Southern Bell Telephone Company without the permission of the United States Government?

"A. * * * And when those circuits go in trouble, the customer notifies us promptly, because they are in use all times, practically around the clock. Then we are notified to go in there and do that. Of course, now, there are times when the customer will come to us and ask us to let them have a circuit for a little while—I mean, we will go to the customer and ask nim to let us have that circuit for a little while in order to make some test or various other changes on it, but we can't take it without his permission, * * *." (R. 373)

"Q. Now, on these GFP cables you testified about, do you get permission from the government before you repair them?

"A. Yes, unless it's evident the whole circuit fails. In other words, if a cable should be totally destroyed, we're going to get an alarm on the thing, and we'll be dispatching people out there right away to repair that circuit. Of course, it doesn't take but a second for those people that are using that circuit all the time to know they're out, and they usually call us up and tell us immediately, 'we've lost this circuit. Will you please get it fixed?' " (R. 378, 379)

We believe that the evidence in the case shows that the government by leasing several circuits did not control and operate the coaxial cables and micro wave towers as charged in the indictment. That leasing of circuits is not synonymous with "operation and control" has been recognized by certain members of Congress is evidenced by the following bill to amend the statute involved in this case to include communication lines leased by the United States from a common carrier.

80th Congress
1st Session

S. 1571

IN THE SENATE OF THE UNITED STATES
March 12 (legislative day,
March 2), 1957

Mr. Bricker introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce

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A BILL

To amend section 1362 of title 18 of the United States Code in order to provide penalties for malicious damage to certain private communication facilities

Be It Enacted By The Senate And House Of Representatives Of The United States Of America In Congress Assembled, That Section 1362 of title 18 of the United States Code is amended by striking out "operated or controlled by the United States" and inserting in lieu thereof "leased, operated, or controlled by the United States or by any common carrier, as defined in section 3 (h) of the Communications Act of 1934".

2. The evidence concerning double jeopardy was before the trial court and the question was raised in the United States Court of Appeals for the Fifth Circuit on a petition for rehearing. We believe we have sufficiently stated our position in the petition for a writ of certiorari. Counsel for the Petitioner in the case of *Bartkus* v. *Illinois*, No. 39 this term, has presented practically the same problem to this

court and we cannot add to the scholarly brief concerning this question.

3. The government argues that Abbate was a keyman in the conspiracy because he contacted Falcone and McLeod, did most of the talking and received the money for expenses from Shelby. However, the conduct of Abbate and Falcone after the meeting with Shelby demonstrates clearly that they did not agree to participate in the proposal made by Shelby to destroy the property of the Southern Bell Telephone Company. Abbate and Falcone could not be engaged in a conspiracy with Shelby and McLeod to destroy the property of the telephone company and at the same time disclose the plot to the telephone company. Nor as fellow conspirators would they inform McLeod that they would not participate in this plot and advise him not to go to Jackson, Mississippi, to carry out Shelby's proposal.

The government argues that Abbate gave McLeod money to go to Jackson, Mississippi, and therefore, this was evidence that he was involved in the conspiracy. However, the government fails to account for McLeod's testimony that Abbate not only tried to dissuade him from going south to participate in the plot but also informed him that he would disclose the plans to the telephone company (R. 57). Although Abbate gave McLeod part of the money he received from Shelby, it was certainly not given by Abbate as a participant in the alleged conspiracy.

A conspiracy has been described as a partnership agreement having crime as its business committed by overt acts. One does not become a partner where he has no intent to enter into such an agreement. The petitioners listened to the proposal of Shelby, took his money under the pretense that they would do his bidding, but actually they never intended to engage in his scheme. Having received the money, the petitioners immediately communicated with the

telephone company which had previously offered a reward for such information (R. 278, 284).

The government cites the case of *United States* v. *Crimmins*, 123 F. 2d 271, to the effect that conspirators are chargeable with what was within reasonable intendment of the common understanding at the time they joined the conspiracy. The other cases relied upon by the government were cited by the Court of Appeals in its opinion and have been analyzed by us in the Petition to show that they are not applicable to our present case. The *Crimmins* case which we cited in our petition supports our view that one cannot conspire to destroy a government circuit of which he has no knowledge of its existence. In the *Crimmins* case, the defendant knew that the securities were stolen, but there was no evidence that he knew that they had been transported in interstate commerce. The court in reversing the conviction held that each conspirator is chargeable with the acts of his fellow done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it.

The petitioners here did not know that the installations which Shelby desired to destroy contained circuits used by the government. The petitioners were both Chicago residents, Abbate was employed as an insurance agent (R. 734), and Falcone worked for the Liquid Carbonic Company (R. 734). Neither of the petitioners had been employed by the telephone company, and there is no evidence that they had any knowledge that the coaxial cables and micro wave towers in Mississippi contained circuits leased by the government. Consequently, it cannot be said that they were presumed to know that these communications were used by the government.

4. In answer to our contention that the petitioners withdrew from the conspiracy if they did in fact engage in such, the government argues that the overt acts of Abbate in arranging a meeting of Falcone and McLeod with Shelby, the division of the expense money, and Falcone's agreement to furnish dynamite were acts in furtherance of a conspiracy. These acts are not charged as the overt acts in the indictment (R. 5). The meeting of the petitioners with Shelby and receiving his money as expenses was not in furtherance of any conspiracy because the petitioners had no intention of entering the conspiracy. The government is incorrect in stating that "Abbate gave McLeod money to go south, sending him on his criminal mission." (Government brief page 13). Although McLeod may have used the money given to him by Abbate to go to Jackson, he testified that Abbate advised him against going there and told McLeod that he was going to inform the telephone company of the plans (R. 57).

For the reasons stated in our petition and in this reply, we respectfully ask the court to grant a writ of certiorari.

Respectfully submitted,

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No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOUIS JOSEPH ABBATE AND MICHAEL LOUIS FALCONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8

CITATIONS

Cases:

Bartkus v. *Illinois*, No. 39, this Term	9
Brady v. *United States*, 24 F. 2d 399, certiorari denied, 278 U. S. 603	9
Clark v. *United States*, 213 F. 2d 63	12
Eldredge v. *United States*, 62 F. 2d 449	13
Hebert v. *Louisiana*, 272 U. S. 312	8
Hyde v. *United States*, 225 U. S. 347	14
Levin v. *United States*, 5 F. 2d 598, certiorari denied, 269 U. S. 562	9
Lutwak v. *Illinois*, 344 U. S. 604	14
McGinley v. *Hudspeth*, 120 F. 2d 523	9
Moore v. *Illinois*, 14 How. 13	8
Pereira v. *United States*, 347 U. S. 1	12
Sexton v. *California*, 189 U. S. 319	8
United States v. *Anderson*, 101 F. 2d 325, certiorari denied, 307 U. S. 625	12
United States v. *Beck*, 118 F. 2d 178, certiorari denied, 313 U. S. 587	13
United States v. *Britton*, 108 U. S. 199	13
United States v. *Compagna*, 146 F. 2d 524, certiorari denied, 324 U. S. 867	14
United States v. *Crimmins*, 123 F. 2d 271	12
United States v. *Lanza*, 260 U. S. 377	8
Williams v. *United States*, 295 Fed. 302	12

Statutes:

18 U. S. C. 371	2
18 U. S. C. 1362	3

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v.

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 33) is reported at 247 F. 2d 410.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1957 (Pet. 40) and a petition for rehearing was denied on September 9, 1957 (Pet. 2). The petition for a writ of certiorari was filed on October 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners could be tried on a federal charge of conspiracy to destroy federally-operated communication systems in violation of 18 U. S. C. 1362 after they had been convicted on a state charge of conspiracy to destroy telephone company property, both charges growing out of the same acts.

2. Whether the evidence established the existence of communication systems operated and controlled by the United States within the meaning of 18 U. S. C. 1362.

3. Whether there was a sufficient showing of knowledge on the part of petitioners that the communications systems they were conspiring to destroy were federally-operated.

4. Whether the evidence was sufficient to establish the participation of petitioners in the conspiracy.

5. Whether it was reversible error to admit evidence of overt acts occurring after petitioners had withdrawn from the conspiracy.

STATUTES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U. S. C. 1362 provides:

> Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

An indictment returned in the United States District Court for the Southern District of Mississippi charged petitioners Abbate and Falcone, and two others, James Shelby and Charles Perry, with conspiring, together with one Norman McLeod (not indicted), to violate 18 U. S. C. 1362 by agreeing willfully and maliciously to injure and destroy, and hinder message transmission over, communication systems operated and controlled by the United States (R. 2). After trial by jury, all of the defendants were convicted (R. 1074). Petitioner Abbate was sentenced to imprisonment for three years (R. 1124–1126), petitioner Falcone for one year (R. 1127–1128), Shelby for three years (R. 1131–1133) and Perry for two years (R. 1129–1131).[1]

[1] In addition, Abbate, Shelby, and Perry were each sentenced to pay fines of $1,000.00.

In a pretrial demand for a separate trial, denied by the court, Shelby and Perry submitted evidence showing that their codefendants Abbate and Falcone, petitioners herein, had been previously convicted in a court of the State of Illinois, upon a plea of guilty, for a conspiracy to destroy communication facilities of named telephone companies, an offense growing out of the same acts as alleged in the federal prosecution (R. 7).

The government's evidence consisted of testimony of Illinois law enforcement officers and officials to whom petitioners had made confessions after their arrest on the state charge, and upon the testimony of McLeod, a co-conspirator who had turned state's evidence, corroborated by testimony of witnesses who had observed and aided the conspirators' movements. This testimony established the following facts:

On April 15, 1955, petitioner Abbate, a resident of Chicago, received a telephone call from an acquaintance who asked if he were interested in making a "fast buck" through a deal involving "Italian confetti", *i. e.*, dynamite (R. 314–315, 738). Abbate expressed interest and agreed to get help from petitioner Falcone, also a Chicago resident, and McLeod, then on parole from the Oklahoma State Penitentiary from a sentence for armed robbery, who was familiar with the use of dynamite (R. 315, 738, 740–741, 24, 47). Arrangement was made by telephone for Abbate to meet a man who would give him details, a man who proved to be James Shelby, an assistant vice pres-

ident of the Communication Workers of America (R. 317). On April 20, 1955, Abbate, with Falcone and McLeod, picked up Shelby from a Chicago street corner, drove around the city for a time, and ended up in a tavern (R. 27–48, 318, 741–743). At this time Shelby spoke of the strike against the Southern Bell Telephone and Telegraph Company, and expressed dissatisfaction with the company's unwillingness to negotiate, saying that it was going to be necessary to "get rough" (R. 38). He told the men that he wanted certain of the company's installations dynamited (R. 40, 742) and gave detailed maps and plans of the installations in three southern states to Abbate (R. 42, 44) designating the places that were to be destroyed (R. 751). At that time, McLeod was introduced to Shelby as the "shooter" (R. 38) and Falcone assumed responsibility for getting the dynamite (R. 45, 46, 48).

The following day Abbate was given five hundred dollars for expenses (R. 47, 752, 760). He gave fifty dollars of this amount to Falcone (R. 752, 760). Abbate, Falcone and McLeod made two unsuccessful attempts to get dynamite (R. 53, 54). Falcone then told McLeod that he could not go south because of business in Chicago (R. 55). Abbate told McLeod that he was not going south because it was too dangerous (R. 56); he suggested to McLeod that they might take the plans and sell them to the telephone company. However, after McLeod "rared up on him," Abbate gave McLeod train fare to Mississippi (R. 57, 752, 761).

McLeod secured dynamite, packed it in three suitcases and left for Mississippi (R. 59–60). In Jackson, Mississippi, he registered at a hotel under an assumed name previously agreed upon by Abbate and Shelby (R. 61, 65, 215–218), and called Charles Perry, the president of the union's local at Jackson, Mississippi (R. 67). He told Perry that Shelby had sent him to do the "shooting" and that the others who were hired had not shown up (R. 68, 71). Perry made arrangements with a girl union member who, posing as McLeod's wife, drove McLeod to varying locations in the area so that he could "spot" company installations, including microwave towers at and near Meridian, Mississippi, which were to be targets (R. 75–80, 646–708). McLeod told Shelby that he felt sure the "other guys" (petitioners here) were going to "double-cross us but I have no proof of it" (R. 81). McLeod received $100 from Shelby (R. 88) and rode with him to see telephone company "huts" which were prospective targets. Before McLeod could do the dynamiting, for which he expected to get $6,000, Shelby told him to go back to Chicago and get the plans from Abbate, giving McLeod $50 for train fare (R. 81–104). Back in Chicago, about April 24th, McLeod called Abbate to get the plans (R. 108). Abbate was very anxious to know what Shelby thought about his failure to come south. He came to see McLeod but did not bring the plans (R. 109).

On April 25th an anonymous telephone caller told the Illinois Bell Telephone Company that he had information he wanted to sell concerning plans of some

persons to destroy property of the Southern Bell Telephone Company (R. 240–241). Since the caller did not want to come in to the company office, a street meeting was arranged for that evening (R. 241). Company investigators arranged to have a Chicago city police officer meet the caller, who turned out to be Abbate (R. 243). Abbate, thinking he was meeting a company representative, told the officer he wanted six thousand dollars for the plans which he had (R. 251). At an appointment arranged by Abbate for the following morning, April 26th, he was arrested (R. 258–259). Chicago police recovered from him copies of the maps and diagrams showing the location of Southern Bell Telephone Company installations which he and Falcone, with the aid of a girl typist, had duplicated from the originals the night before (R. 260, 636–641). Both he and Falcone made admissions at the time to the Illinois authorities (R. 730–765).

Two days after the arrest of Abbate and Falcone, two installations, including a "hut" through which government circuits were amplified, were damaged by explosions (R. 504–508).

The government showed through testimony of an expert witness, an engineer of the Southern Bell Telephone Company, that no less than twenty-one of its circuits or facilities running through two sets of coaxial cable in the area designated by the plans found in Abbate's possession were used solely by agencies of the United States, including the Civil Aeronautics Administration and such military units as the Strategic Air Command and the Navy (R. 357–402). With the

aid of a map, the expert traced these lines through the dynamite target points (R. 364–385), pointing out that the "huts" performed the function of amplifying messages sent through cables (R. 362) and that the microwave towers amplified radio messages (R. 386). The expert testified that many of these circuits were used, operated and completely controlled by the United States twenty-four hours a day (R. 371, 380–382), and that they could not be repaired or otherwise touched by the company without permission of the government (R. 373, 377). It was established that Perry and Shelby had first hand knowledge of these full-time government circuits gained through their association with the telephone company (R. 435–442, 493–498).

On appeal, the Court of Appeals affirmed as to petitioners, but, ruling that evidence of their statements made after arrest by Chicago police was improperly admitted as against the other conspirators then still at large, reversed as to Shelby and Perry (Pet. 39).

ARGUMENT

1. Presumably because of the many decisions by this Court that the federal and state governments are separate sovereigns which may inflict separate punishments for offenses against each sovereign arising out of a single act,[2] petitioners did not enter a plea of double jeopardy before or at the trial based on their prior conviction and three month sentence by the Illinois court. In this Court, however, they call attention to

[2] *Moore* v. *Illinois*, 14 How. 13; *Sexton* v. *California*, 189 U. S. 319; *United States* v. *Lanza*, 260 U. S. 377; *Hebert* v. *Louisiana*, 272 U. S. 312.

the fact that this issue of double jeopardy is presently before this Court for reexamination. *Bartkus* v. *Illinois*, No. 39, this Term, does involve prosecution by different sovereigns for the same act of bank robbery where the only differentiating element of the federal offense is the allegation of the facts necessary for federal jurisdiction. That is also the situation here, although this case is distinguished from *Bartkus* in three respects. First, in *Bartkus*, the plea of double jeopardy was raised before the second trial. Second, *Bartkus* arises in the context of a state trial after a federal trial while this case involves the converse situation, a federal trial after a state trial. Third, in *Bartkus*, the first trial ended in an acquittal rather than, as here, a conviction. Nevertheless, it may be that the decision in *Bartkus* will have a bearing on the problem presented here, since the facts which would support a plea of double jeopardy, which are not disputed, were before the trial court and the case is now pending on direct review of the conviction. Therefore, despite the rule that double jeopardy is a defense which is waived if not timely raised,[3] the Court may wish to defer disposition of this petition until the *Bartkus* case is decided.

2. Petitioners attack the sufficiency of the evidence to establish that there was an interest of the government protected by 18 U. S. C. 1362. Government testimony painstakingly developed that there were

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[3] *Levin* v. *United States*, 5 F. 2d 598 (C. A. 9), certiorari denied, 269 U. S. 562; *Brady* v. *United States*, 24 F. 2d 399 (C. A. 8), certiorari denied, 278 U. S. 603; *McGinley* v. *Hudspeth*, 120 F. 2d 523 (C. A. 10).

"closed government circuits" running through the conspiracy target area (R. 370–402). No less than twenty-one circuits were identified by number and location and specified as being under the control of the Strategic Air Command, the Navy or the Civil Aeronautics Administration. Most were designated by name as "GFP" or "Government Full Period" circuits (R. 375); the government operation and control was said to be in effect twenty-four hours a day. (R. 371, 372, 380). There was testimony that these circuits were "turned over to the Government and marked in such a way that nobody has any right to fool with them at all" and that they could not be repaired by the telephone company without the permission of the government (R. 373, 377, 378, 381), and that in some instances, where the military owned the distribution cables, the government did its own repairs (R. 378). Some of the circuits, designated as "TT" or teletypewriter circuits, were described as engineered military circuits which were held in readiness for a national emergency and which carried messages transmitted by electric machines operated exclusively by the government (R. 381, 382); with respect to those connecting with overseas circuits in Washington, the telephone company had no control whatever (R. 383). Petitioners' argument, which seems to rest on the premise that the telephone company had complete control, is factually unfounded. These circuits were a means of communication operated and controlled by the United States.

Petitioners are apparently contending, in addition, that because these circuits were percentage-wise a

small proportion of the total circuits passing through coaxial cables of the telephone company, they are not a means of communication operated and controlled by the United States within the meaning of the statute. The plain meaning of the statute refutes this contention. The language prohibits the injury or destruction of "any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States * * *". It likewise prohibits the interference "in any way with the working or use of any such line, or system", or the obstruction, hindrance or delaying of "the transmission of any communication over any such line, or system * * *". This broad and inclusive language, with emphasis on operation and control, shows the vital purpose of the legislation to protect government communications, not simply government-owned lines as petitioners contend (Pet. 19). The indictment (R. 3) charged a conspiracy in the words of the statute to destroy property which was an essential and integral part of systems and means of communication operated and controlled by the United States, to interfere with the use and working of communication systems so operated and controlled, and to obstruct the transmission of communications over such systems. The evidence, showing the full-time and exclusive government use of specified communication circuits, was more than sufficient to prove these charges.

3. Petitioners allege that there was insufficient evidence of their knowledge of the existence of the government's communication systems to hold them liable for conspiracy to obstruct the transmission of communications over such systems. Although, admittedly, the evidence showed that co-conspirators Perry and Shelby had knowledge of the government circuits, we do not argue that this knowledge can automatically be imputed to petitioners. It must be shown that the conspiracy which petitioners joined was one to violate a federal law and therefore that interference with the federal system was within the contemplation of the conspiracy. But it is clear that petitioners are chargeable with what was within the "reasonable intendment of the common understanding" at the time they joined the conspiracy. *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C. A. 2). Here the express agreement contemplated the destruction of communication systems covering three states. Where destruction having such widespread effect is intended, interference with federal communications should be regarded as a natural consequence which must follow from such destruction. See *United States* v. *Anderson*, 101 F. 2d 325 (C. A. 7), certiorari denied, 307 U. S. 625; *Williams* v. *United States*, 295 Fed. 302 (C. A. 5);[4] see also, *Pereira* v. *United States*, 347 U. S. 1, and *Clark* v. *United States*, 213 F. 2d 63 (C. A. 5). Petitioners, we think, agreeing to destroy such communications facilities, in

[4] In these cases defendants who were shown to have conspired to cripple railroad transportation were presumed to have intended consequences of their acts which in *Anderson* obstructed passage of mail and, in *Williams*, restrained interstate commerce.

reckless disregard of who might control or operate them, must under these circumstances be held to have embraced a conspiracy which contemplated the natural consequences of such action—the obstruction of government communications.

4. Petitioners contend further that they never intended to enter the conspiracy and that they withdrew before an overt act was committed in its furtherance. The facts clearly show this contention to be without merit.

Petitioner Abbate was a keyman in the formation of the conspiracy. It was he who contacted petitioner Falcone and McLeod (R. 740–741) and brought them together with Shelby (R. 741–742). It was he who did most of the talking (R. 39), and who received the money for expenses connected with the planned destruction (R. 752). Petitioner Falcone received fifty dollars of this expense money (R. 760) and agreed to get the dynamite (R. 45). A conspiracy existed and overt acts in furtherance thereof had been committed at this point. Moreover there was no showing of withdrawal at that time. While petitioners refused to go south, Abbate gave McLeod the money to go south, sending him on his criminal mission (R. 56). At this time certainly the conspiracy was still existing as to petitioners. See *United States* v. *Britton,* 108 U. S. 199; *United States* v. *Beck,* 118 F. 2d 178 (C. A. 7), certiorari denied, 313 U. S. 587; *Eldredge* v. *United States,* 62 F. 2d 449 (C. A. 10). Abbate did not in fact arrange his surreptitious contact with the telephone company until April 25th after McLeod had re-

turned from the south. And up until this time at least there had been no affirmative or effective act which could constitute a withdrawal. *Hyde* v. *United States*, 225 U. S. 347; *Eldredge* v. *United States, supra*; *United States* v. *Compagna*, 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867.

5. Petitioners contend that the trial court committed prejudicial error in admitting into evidence testimony concerning actual dynamiting, occurring on April 28, 1955, which damaged or destroyed facilities included in conspiratorial plans. Such testimony was clearly admissible against Shelby and Perry, not only to indicate the nature of the conspiracy, but for the reason that they were still at large and presumably acting pursuant to the conspiracy. We assume that petitioners, having made disclosures and having been jailed two days earlier, could not have been directly responsible for the destruction. Nevertheless we believe such evidence to have been admissible against them to show the nature of the original conspiracy which they joined. See *Lutwak* v. *United States*, 344 U. S. 604. Moreover, even assuming the evidence to be improper, its admission would have been harmless error under the circumstances here. The jury could not have been misled. The evidence was clear that petitioners were in jail at the time of the bombings. The charge of the court indicated that they were at this time "out of the conspiracy".[5] It was the detailed testimony recount-

---

[5] Thus the charge reads in part (R. 1049–1050):
"Now, you have evidence here tending to show that while this thing happened in Chicago, in which the officers arrested Abbate

ing petitioners' admissions, corroborated by the testimony of McLeod and others, which provided overwhelming proof of their guilt.

Respectfully submitted.

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NOVEMBER 1957.

---

and afterwards arrested Falcone, that it happened before the dynamiting down here. * * *

"Now, as to these two men, when they were arrested by the officers and were placed in prison, they no longer had any power to commit acts or to do things that might bind the others and for that reason, while I had some question in my mind at first, a careful examination of the law has convinced me that I should charge you that insofar as their statements to the police officers up there are concerned, and to the extent that they may involve anybody else, it is not to be considered against the other person. In other words, it can be considered against them alone and it can, even though they were out of the conspiracy, that evidence is admissible against them for the purpose of proving that they were parties to the conspiracy. In other words, they can make admissions insofar as they are concerned and it is receivable in evidence to be received along with all the other evidence to determine whether they were parties to the conspiracy."

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SUPREME COURT, U. S.

No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1958

LOUIS JOSEPH ABBATE AND MICHAEL LOUIS FALCONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Summary of argument	9
Argument	15
I. Since the federal statute protects an important federal interest which is entirely different from the interest of the state, the two offenses are different in law and in fact. Hence, federal prosecution after a state conviction does not violate double jeopardy	18
A. Where the interests protected by state and federal statutes are different, the offenses created by those statutes are distinct	18
B. In this case, each indictment had as an essential substantive element a factor not present in the other, reflecting in each instance a peculiar and separate interest of the prosecuting sovereign	24
II. In any event, a prior state prosecution cannot preclude federal enforcement of federal law	31
A. The question of what effect a prior state conviction has on the right of the federal government to prosecute is reached in this case only if the crimes and the interests protected by both sovereigns are found to be identical	31
B. The federal government should properly be free to enforce federal law regardless of state action	35
Conclusion	45

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CITATIONS

Cases: Page

Adamson v. *California*, 332 U. S. 46 35
American Tobacco Co. v. *United States*, 328 U. S. 781 .. 32
Barron v. *Baltimore*, 7 Pet. 243 35
Bartkus v. *Illinois*, 355 U. S. 281 .. 11, 13, 14, 20, 25, 26, 31
Bell v. *United States*, 349 U. S. 81 ..... 23, 28
Blockburger v. *United States*, 284 U. S. 299 ..... 12, 23
California v. *Zook*, 336 U. S. 725 ..... 19, 25
Commonwealth v. *Alderman*, 4 Mass. 477 43
Cross v. *North Carolina*, 132 U. S. 131 ..... 21, 40
Crossley v. *California*, 168 U. S. 640 ..... 21, 22
Feldman v. *United States*, 322 U. S. 487 37
Fox v. *Ohio*, 5 How. 410 ..... 11, 21
Gavieres v. *United States*, 220 U. S. 338 ..... 12, 23
Gilbert v. *Minnesota*, 254 U. S. 325 21
Gore v. *United States*, No. 668, Oct. Term, 1957, decided June 30, 1958 ..... 12, 23, 24, 32
Hebert v. *Louisiana*, 272 U. S. 312 ..... 19, 35
Hoag v. *New Jersey*, 356 U. S. 464 ..... 23, 24
Jack v. *Kansas*, 199 U. S. 372 38
Jerome v. *United States*, 318 U. S. 101 ..... 19, 35
Kelly v. *Washington*, 302 U. S. 1 25
Knapp v. *Schweitzer*, No. 189, Oct. Term, 1957, decided June 30, 1958 ..... 35, 38
Logan v. *United States*, 144 U. S. 263 38
Maloney v. *People*, 132 Ill. App. 184 24
McKelvey v. *United States*, 260 U. S. 353 21
Palko v. *Connecticut*, 302 U. S. 319 35
Pennsylvania v. *Nelson*, 350 U. S. 497 ..... 14, 18, 30, 34
People v. *Buckminster*, 282 Ill. 177, 118 N. E. 497 ... 29
People v. *Dorman*, 347 Ill. App. 317, 106 N. E. 2d 842 .. 24
People v. *Flaherty*, 396 Ill. 304, 71 N. E. 2d 779, certiorari denied, 331 U. S. 856 24
People v. *Livermore*, 390 Ill. 85, 60 N. E. 2d 413 24
People v. *Walker*, 7 Ill. 2d 158, 130 N. E. 2d 182 25
Pettibone v. *United States*, 148 U. S. 197 ..... 21, 29
Pinkerton v. *United States*, 328 U. S. 640 23
Rea v. *United States*, 350 U. S. 214 37
Reid v. *Colorado*, 187 U. S. 137 25
Screws v. *United States*, 325 U. S. 91 ..... 12, 22, 35
Sexton v. *California*, 189 U. S. 319 21

Cases—Continued Page
Siebold, Ex parte, 100 U. S. 371 ..... 11, 21, 22
State v. *Cole*, 48 Mo. 70 43
State v. *Little*, 1 N. H. 257 43
Union Brokerage Co. v. *Jensen*, 322 U. S. 202 25
United States v. *Bernhart*, 22 Fed. 285 44
United States v. *Bostow*, 273 Fed. 535 38
United States v. *Cruikshank*, 92 U. S. 542 ..... 11, 22
United States v. *Lanza*, 260 U. S. 377 ..... 10, 13, 14, 15, 17, 19, 30, 31, 34, 35, 36, 37
United States v. *Marigold*, 9 How. 559 21
United States v. *Universal C. I. T. Credit Corporation*, 344 U. S. 218 23
Westfall v. *United States*, 274 U. S. 256 ..... 21, 41
Constitution and Statutes:
Constitution of the United States:
Fifth Amendment 33, 35
Seventh Amendment 33
Act of June 23, 1874, 18 Stat. 250 26
Act of March 4, 1909, 35 Stat. 1099, 18 U. S. C. (1940 ed.) 116 ..... 26, 27
Federal Kidnapping Act, 18 U. S. C. 1201 20
Mail Fraud statute, 18 U. S. C. 1341 20
Mann Act, 18 U. S. C. 2421 20
R. S. 5418 40
Stolen Motor Vehicle Act, 18 U. S. C. 2312 20
18 U. S. C. 371 2
18 U. S. C. 659 36
18 U. S. C. 660 36
18 U. S. C. 1862 ..... 3, 16, 25, 26, 28
18 U. S. C. 1992 36
18 U. S. C. 2117 36
Smith-Hurd Ill. Stat. Ann. (1957 Supp.), Title 38:
Section 139 ..... 3, 9
Section 140 25
Miscellaneous:
55 Columbia L. R. 83 36
2 Cong. Rec. (pt. 4) 3203 26
2 Cong. Rec. (pt. 5) 4207 26
42 Cong. Res. 857 27

Miscellaneous—Continued

	Page
J. A. C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Col. L. R. 1309–1331	31, 32
J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U. C. L. A. L. Rev. 1–37	31, 43
Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L. J. 513 (1949)	24
2 Moore, Ill. Crim. L. and Proc. (1932 Ed.), Sec. 971	24
S. Rep. 10, pt. 1, 60th Cong., 1st Sess., p. 16	27–28

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 38–43) is reported at 247 F. 2d 410.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1957 (R. 44) and a petition for rehearing was denied on September 9, 1957 (R. 44). The petition for a writ of certiorari was filed on October 8, 1957, and was granted as limited, on December 16, 1957 (R. 45; 355 U. S. 902). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED[1]

Whether the petitioners were twice placed in jeopardy, contrary to the Fifth Amendment, by their conviction in the Southern District of Mississippi for conspiracy to destroy communication facilities "operated or controlled by the United States", in violation of 18 U. S. C. 1362, after they had been convicted in the courts of the State of Illinois on their plea of guilty to an indictment for conspiring in that state to injure property of two private communications corporations.

STATUTES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

---

[1] The grant of certiorari was limited to question 2 of the petition for the writ, which reads as follows (355 U. S. 902):

"Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States."

18 U. S. C. 1362 provides:

> Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Title 38, Section 139, Smith-Hurd Ill. Stat. Ann. (1957 Supp.) provides in pertinent part:

> CONSPIRACY TO DO AN ILLEGAL ACT—BOYCOTT—BLACK LIST—PENALTY—MARKETING ASSOCIATIONS OF FARMERS, DAIRYMEN AND FRUIT GROWERS NOT INCLUDED—COMMON LAW CONSPIRACY.—If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment, or property of another, or to obtain money or other property by false

pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice or to prevent competition in the letting of any contract by the State, or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be fined not exceeding $2000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary.

* * * * *

STATEMENT

1. An indictment returned in the United States District Court for the Southern District of Mississippi on January 23, 1956 (R. 2) charged petitioners Abbate and Falcone, and two others, James Shelby and Charles Perry, with conspiring, together with one Norman McLeod (not indicted), from about April 1, 1955 to about May 12, 1955, in the Jackson Division of the Southern District of Mississippi, to violate 18 U. S. C. 1362, *supra,* by agreeing willfully and maliciously to injure and destroy, and hinder message transmission over certain works, property and material known as coaxial repeater stations and micro-wave towers located in the States of Missis-

sippi, Tennessee, and Louisiana which were "essential and integral parts of systems and means of communication operated and controlled by the United States" (R. 2–5). The indictment also charged that petitioners conspired to "wilfully and maliciously interfere in the use and working of communication systems operated and controlled by the United States by damaging same." (R. 3.) The following overt acts were alleged as in furtherance of the conspiracy charged (R. 4–5):

> 1. On or about April 19, 1955, at Chicago, Illinois the defendant James Shelby met and conferred with Louis Joseph Abbate, Michael Louis Falcone and Norman D. McLeod, alias John Morton.
>
> 2. On or about April 19, 1955, at Chicago, Illinois, the defendant James Shelby delivered to Louis Joseph Abbate, Michael Louis Falcone, and Norman D. McLeod, alias John Morton, three large manila envelopes containing maps and plans showing the locations and certain coaxial repeater stations and micro-wave towers in the States of Tennessee, Louisiana and Mississippi.
>
> 3. On or about April 21, 1955 Norman D. McLeod, alias John Morton, traveled from Chicago, Illinois to Jackson, Mississippi, and carried with him suitcases containing dynamite, fuses, caps, and other materials suitable and designed for use as explosives.
>
> 4. On or about April 22, 1955 James Shelby checked into the Edwards Hotel, Jackson, Mississippi.
>
> 5. On or about April 22, 1955, at Jackson,

Mississippi, the defendants, James Shelby and Charles G. Perry, met and conferred with Norman D. McLeod, alias John Morton.

6. On or about April 22, 1955 Charles G. Perry drove Norman D. McLeod, alias John Morton, from Jackson, Mississippi into Rankin County, Mississippi for the purpose of locating and inspecting installations to be dynamited.

7. On or about April 22, 1955 James Shelby met Norman D. McLeod, alias John Mornton, (sic) and drove McLeod North on U. S. Highway 51 into Madison County, Mississippi to point out installations to be dynamited.

8. On or about April 23, 1955 Charles G. Perry drove Norman D. McLeod, alias John Morton, in and around Jackson, Mississippi.

9. On or about April 25, 1955, at Chicago, Illinois, Louis Joseph Abbate and Michael Louis Falcone caused to be typed copies of maps and plans showing locations of installations in Mississippi, Tennessee and Louisiana.

10. On or about April 28, 1955, on U. S. Highway 49, about 23 miles South of Jackson, Mississippi, in Simpson County, Mississippi, an explosion damaged a repeater station containing a coaxial cable which was an essential and intergral (sic) part of a system and means of communication operated and controlled by the United States.

After trial by jury, on June 22, 1956, all of the defendants were convicted (R. 33–34).[2] On appeal, the Court of Appeals affirmed as to petitioners, but re-

[2] Petitioner Falcone was sentenced to imprisonment for one year (R. 36–37); petitioner Abbate was sentenced to imprisonment for three years and to pay a fine in the amount of $1,000 (R. 34–35).

versed as to Shelby and Perry on the ground that evidence of statements made by petitioners to Illinois authorities after arrest had been improperly admitted as against the other conspirators (R. 38–43). As to petitioners, the Court of Appeals found (1) that the evidence was sufficient to establish the fact of the conspiracy and the overt acts in furtherance thereof alleged in the indictment; (2) that (R. 43) "[t]here was ample evidence from which the jury could have found that, though the facilities were owned by the telephone company [Southern Bell Telephone and Telegraph Company], many of the circuits were under full time operation and control by the Government, and that the telephone company could not even make repairs on such circuits without first obtaining the Government's permission"[3]; and

[3] The government showed through testimony of an expert witness, an engineer of the Southern Bell Telephone Company, that no less than twenty-one of its circuits running through two sets of coaxial cables in the area designated by plans found in petitioner Abbate's possession were used solely by agencies of the United States, including the Civil Aeronautics Administration and such military units as the Strategic Air Command and the Navy (Tr. 357–402). Many were used twenty-four hours a day (Tr. 371, 372, 380–382); bore distinctive government markers; and could not be repaired or otherwise touched by the company without permission of the government (Tr. 373, 377). In some instances, where the military owned the distribution cables, the government did its own repairs (Tr. 378). Some of the circuits, designated as "TT" or teletype-writer circuits, were described as engineered military circuits which were held in readiness for a national emergency and which carried messages transmitted by electric machines operated exclusively by the government (Tr. 381, 382); with respect to those connecting with overseas circuits in Washington, the telephone company had no control whatever (Tr. 383).

(3) that the evidence was sufficient to prove that the destruction of such federally operated and controlled property, the object of the conspiracy charged in the indictment, and prohibited by 18 U. S. C. 1362, was within the contemplation of the conspirators (R. 38–43).

2. For the first time in this Court, petitioners raised the contention that the present prosecution placed them twice in jeopardy for "the same offense" of which they had previously been convicted on their plea of guilty in the Criminal Court of Cook County, Illinois, and for which they had been sentenced to imprisonment for terms not to exceed three months (Pet. Br. 6; R. 39, fn. 4). The evidence as to petitioners' prior state convictions was offered by the co-defendants, Shelby and Perry, in connection with their motions for a separate trial (R. 5–7). This matter was also adverted to in the application for probation on behalf of petitioners as an ameliorating factor to be considered in imposing sentence (R. 33).[4] All that appears as to the state proceedings is (1) the testimony at the federal trial to the effect that petitioners were arrested by the local Illinois authorities on or about April 26, 1955 (Transcript 253, 258; R. 16–17); (2) the eight-count state indictment which had been returned on May 25, 1955 (R. 8–13); and (3) the fact that on August 15, 1955, petitioners received sentences of three months on their pleas of guilty to the state indictment (R. 32). The state indictment (based on

[4] At that time, government counsel pointed out that the state proceeding was (R. 33) "not the identical offense, but an offense against the State of Illinois."

Title 38, Section 139, Smith-Hurd Ill. Stat. Ann. (1957 Supp.) *supra*, pp. 3–4) charged both petitioners in each count with conspiring in Cook County, Illinois, on or about April 19, 1955, with co-conspirators Shelby and McLeod and others [5] "with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure the property of another, to wit: to injure communication facilities belonging to the Southern Bell Telephone and Telegraph Company, a corporation, without the consent of said Southern Bell Telephone and Telegraph Company, and to injure communications facilities belonging to the American Telephone and Telegraph Company, a corporation, without the consent of said American Telephone and Telegraph Company, by use of explosive * * *" (R. 8, 13). This indictment set forth no overt acts in furtherance of the conspiracy, and, since petitioners entered a plea of guilty in the state proceeding, no evidence was taken.

SUMMARY OF ARGUMENT

Petitioners were convicted in a federal court in Mississippi of having conspired to injure or destroy, in that state, telephone circuits "operated or controlled" by the United States, and to interfere with the use and working of a communications system operated and controlled by the United States. They had previously, in Illinois, pleaded guilty to a state indictment charging them with having conspired, in Illinois, to injure property of two private telephone companies. Assuming that the two indictments are

[5] Co-defendant Perry was not named in the state indictment as a co-conspirator.

based on the same acts (petitioners having participated in the federal conspiracy only in Illinois), it does not follow that the two offenses are the same. The federal statute protects against sabotage of federally-operated or controlled communications systems. It thus reflects a specific and peculiar federal interest. The state statute protects private property, in general, against malicious destruction, this being the limit of the state interest involved here. The "gist" or "purpose" of the statutes making the conduct criminal is different; the state and federal statutes seek to protect "separable social interests." The successive prosecutions therefore did not violate the double jeopardy clause of the Constitution.

I

A. Not all successive prosecutions by state and federal governments raise the same problems of jurisdiction and jeopardy. At the extremes of the spectrum are, on the one hand, crimes punishable only by the state and, on the other, those in which the federal government has preempted the entire field. Between these extremes there are at least four different categories of crimes which can involve prosecutions by each sovereign for the same acts.

1. There are crimes where the exercise of federal and state jurisdiction is concurrent in the sense that both sovereigns punish the same crime, *i. e.*, the elements of both offenses are identical. Such was the situation in *United States* v. *Lanza*, 260 U. S. 377.

2. There is another category where the state and federal governments are protecting essentially the same

interests, but where there is an additional element of the federal offense which is derived solely from the fact that a separate sovereign is involved. The petitioner in *Bartkus* v. *Illinois,* 355 U. S. 281, presently before this Court on reargument, No. 1, argues that the federal and state bank robbery statutes there involved fall in this category.

3. Still further removed from concurrent jurisdiction are the large number of federal crimes which are proscribed to supplement and assist state law enforcement by use of the exclusive federal power over interstate facilities. Although the social interest protected is the same, the particular act prohibited by the federal government is beyond the reach of the state and must be performed before a federal crime has been committed.

4. A fourth group contains those cases where the federal and state statutes may cover the same physical acts, but where the federal and state statutes protect "separable social interests" and have different "gists" or "purposes." Thus, the interest of a state in preventing cheating is different from the interest of the federal government in prohibiting counterfeiting. *Fox* v. *Ohio,* 5 How. 410. The interest of the federal government in protecting a marshal executing its process is different from that of the state in preventing assault. *United States* v. *Cruikshank,* 92 U. S. 542, 550–551. The interest of the federal government in protecting federal elections is different from the interest of the state in protecting state elections, even if the criminal acts are done at the same time. *Ex parte Siebold,* 100 U. S. 371, 393. The same act may violate

state law against assault and also constitute a deprivation of federal civil rights. *Screws* v. *United States,* 325 U. S. 91.

B. This case falls within the fourth category mentioned above, for the special interest of the federal government in keeping open *its* communications by prohibiting sabotage of lines which *it* operates or controls is of a different nature and quality from the general interest of the state in protecting private property.

The federal statute is derived from legislation which originated in the House Committee on Military Affairs, together with other legislation dealing with problems arising out of the Civil War. It was designed as an antisabotage law to protect communication facilities used by the federal government which had not been adequately protected during the war crisis. Thus, the interest sought to be protected by the federal statute is a peculiarly federal interest; the interest sought to be protected by the Illinois statute prohibiting destruction of private property is peculiarly a local interest. Under the federal statute it is necessary to prove knowledge by the conspirators of federal operation and control. Proof that the conspiracy was directed only to injury of private property, which would suffice under the state statute, would not have established the federal offense. Under established principles, since each statute and each indictment required proof of an essential element not a part of the other, the two offenses are separate. *Gore* v. *United States,* No. 668, Oct. Term, 1957, decided June 30, 1958; *Blockburger* v. *United States,* 284 U. S. 299;

Gavieres v. *United States*, 220 U. S. 338. Hence, separate punishment by the state and federal government for the two separate offenses does not violate the double jeopardy clause.

The particular facts of this case emphasize the undesirable results that can flow from permitting a state prosecution to preclude federal enforcement in this category of cases. The state returned an indictment, to which petitioners pleaded guilty, charging conspiracy to injure private property which was physically situated, not in Illinois, but in Mississippi. However adequate Illinois may have regarded the three-month sentence imposed upon petitioners for the conspiracy to injure private property located in Mississippi, it is not the measure of the right of the federal government to punish a conspiracy to interfere with the use and working of a federally-controlled communications system, or of the interest of the federal government in preserving that system inviolate. The federal government must be able to act independently to enforce its federal law protecting federally-controlled property. If the rule were otherwise, so that a state conviction would preclude federal prosecution even though the state was less concerned with the particular violation of its laws, or had interests different from those of the United States, the fear expressed in *Lanza* of the "race of offenders" to state courts might well be realized.

II

A. Petitioner, as does the petitioner in *Bartkus*, No. 1, seeks to have this Court reconsider its holding in *Lanza*. But since the offenses prosecuted by

the state and federal governments were different in this case—as we have shown in Point I—no occasion for such a reexamination is presented here. Moreover, a ruling in favor of the petitioner in *Bartkus* would not be controlling in this case for the additional reason that *Bartkus* involves a state trial *after* a federal *acquittal* whereas, in this case, a federal trial followed a state conviction. In *Bartkus,* petitioner urges that federal supremacy bars a state trial after a federal acquittal. Here, on the other hand, the interests of federal supremacy operate to validate the subsequent federal action.

To reach the basic issues of the relationship of double jeopardy to our system of federalism one must hypothesize (1) a valid federal law protecting the identical interests as those sought to be protected by the state, and (2) that, despite this identity of interests, federal preemption has not occurred. Because the federal law here in question is an anti-sabotage statute dealing with aspects of national security, this latter assumption may well be an unrealistic one under *Pennsylvania* v. *Nelson,* 350 U. S. 497, even if the first criterion is met.

B. But, assuming both hypotheses to be present, we submit that, as *Lanza* held, the federal government is free—unless Congress otherwise provides, as it has on occasion done—to pursue federal policy in the federal courts despite a prior state conviction. Each government is acting within its own sphere in determining what shall be an offense against its peace and dignity. Even where the social interest protected is the same, the offenses as defined by the dif-

ferent legislatures may be and frequently are different. And to the extent that the interests are separately defined and separately punished, it cannot be said that the policies of one sovereign are effectively enforced by the other. Under our established principles of federalism, each sovereign is free to enforce its own law without regard to action by the other. And where the federal government is concerned, the doctrine of federal supremacy reenforces that right of freedom from state control or state supersession.

As was pointed out in *Lanza,* if the federal government were precluded by a prior state criminal proceeding, there would be grave possibilities of the hobbling of federal law enforcement, especially in certain areas where particular federal laws may be locally unpopular (as was Prohibition). This diminution in the effectiveness of federal law enforcement would be difficult to avert. The rule that a mock trial does not constitute jeopardy would not offer any real protection against the invocation of the state courts to thwart federal policy. Unfortunately, in areas where real conflicts between federal and state policy may develop, the prior state proceedings may in form be initiated by the state itself and the problems of proving collusiveness would, in the vast majority of instances, be insurmountable.

ARGUMENT

The problem in this case is whether petitioners' conviction in the Southern District of Mississippi for conspiracy between April 1, 1955, and May 12, 1955, to injure or destroy telephone circuits "operated or

controlled" by the federal government, and to interfere in their use and operation, in violation of 18 U. S. C. 1362, *supra*, p. 3, is precluded by their previous conviction in the Criminal Court of Cook County, Illinois. The state proceedings arose under an indictment which charged petitioners with conspiring, on or about April 19, 1955, in the jurisdiction of that court, to injure the property of the Southern Bell Telephone and Telegraph Company and the facilities of the American Telephone and Telegraph Company, against the peace and dignity of the People of the State of Illinois (R. 8–13). On the assumption that both crimes depend for their proof "upon the same facts" (Pet. 2), petitioners contend that they have been twice put in jeopardy.

The premise that the two indictments are based on the same facts is not established by the record; it is at most only inferentially suggested. The Illinois indictment, which alleges no overt acts, charged a conspiracy in Illinois on April 19, 1955, to injure the property of two private companies. The federal Mississippi indictment lays the venue of the conspiracy in Mississippi, and while it alleges overt acts by these petitioners in Illinois on April 19, 1955, it also alleges a further overt act by them in Illinois on April 25, 1955. (Paragraph 9, p. 6, *supra*.) Since, however, the evidence at the federal trial showed that petitioners' participation in the conspiracy was limited to activities in Illinois, we may accept the premise that the *acts* of petitioners which gave rise to both indictments were the same. It does not follow, however, that the *offenses* were the same.

The interests protected by the two statutes—private property protected by the state, and the federally operated and controlled communications system protected by the federal statute—are legally and factually different. The resultant injury in each case is legally and factually different. Hence, the two offenses are different, not merely because different sovereigns created the offenses, but because their essential elements and purposes are different. For that reason, we do not believe that this case presents the question of whether, under the double jeopardy clause of the Federal constitution, the federal government may prosecute a defendant after a trial for the same type of offense under state law protecting the same social interest. See *United States* v. *Lanza,* 260 U. S. 377, upholding such successive prosecutions. In view of the substantial separate federal interest protected by the federal statute, no state prosecution could preclude the federal government from enforcing its laws designed to protect property which it operates and controls as a part of a federal communications system. See Point I, *infra.*

Moreover, although we believe that this case does not truly present the basic issue of double jeopardy decided in *Lanza,* we also submit, following *Lanza,* that the national government should be free to pursue its policies in the federal courts even if it be assumed *arguendo* that the federal and state interests in this case are identical. See Point II, *infra.*

I

SINCE THE FEDERAL STATUTE PROTECTS AN IMPORTANT FEDERAL INTEREST WHICH IS ENTIRELY DIFFERENT FROM THE INTEREST OF THE STATE, THE TWO OFFENSES ARE DIFFERENT IN LAW AND IN FACT. HENCE, FEDERAL PROSECUTION AFTER A STATE CONVICTION DOES NOT VIOLATE DOUBLE JEOPARDY.

A. *Where the interests protected by state and federal statutes are different, the offenses created by those statutes are distinct.*

Petitioners' entire argument is based on the premise that, where state and federal prosecutions are based on the same *acts*, the prosecutions are necessarily for the same *offense*. This easy assumption disregards the complexities of our federal structure. Merely because both the state and the federal government may have exercised legislative power—so that, in a particular factual context, a single act may offend both sovereigns—does not mean that the interests which each sovereign sought to protect are the same. For this reason, before turning to the facts of this case, we think it is important to note at the outset that not all successive prosecutions by state and federal government for the same acts fall within the same pattern. Between the two extremes of crimes punishable only by the state and those in which the federal government has preempted the whole field (see *Pennsylvania* v. *Nelson*, 350 U. S. 497), there are at least four different categories of crimes which can involve prosecutions by each sovereign for the same acts:

1. There are crimes where the exercise of federal and state jurisdiction is truly concurrent. Such is

the crime of carrying passengers in interstate commerce without a license from the Interstate Commerce Commission, before this Court in *California* v. *Zook,* 336 U. S. 725, where it was held that the state had the power to make such an act an offense under state law. Analogous to that situation were the prohibition offenses which came before this Court in *United States* v. *Lanza,* 260 U. S. 377 and *Hebert* v. *Louisiana,* 272 U. S. 312. The Eighteenth Amendment specifically conferred concurrent jurisdiction on the federal government and the states. While this Court, in those cases, held that the exercise of state power to punish crime did not stem from that Amendment alone, the fact that the crimes arose under the Eighteenth Amendment did make it immaterial that the federal legislation defined the offense in the precise manner in which the crimes were defined by the state. In *Lanza,* a federal prosecution for manufacturing, transporting and possessing liquor followed a state conviction for these offenses. In the *Hebert* case, a state prosecution for manufacturing liquor was initiated and completed while the defendant was under indictment for the same offense in the federal courts. In holding that successive prosecutions were permissible, this Court assumed that the offenses were the same.

2. There is another category where the state and federal governments are protecting essentially the same interests, but where there is an additional element of the federal offense which is derived solely from the fact that a separate sovereign is involved. See *Jerome* v. *United States,* 318 U. S. 101, 105. The

petitioner in *Bartkus* v. *Illinois*, 355 U. S. 281, presently before this Court on reargument, No. 1, argues that the federal bank robbery statute proscribes such an offense, in that it is designed to protect the bank rather than a specific federal interest, and only the jurisdictional difference distinguishes the two offenses.

3. Still further removed from concurrent jurisdiction are the large number of federal crimes which are designed to supplement and assist state law enforcement by using the exclusive federal power over interstate commerce to prevent perpetration of crime or the transmission of contraband. The Mail Fraud statute (18 U. S. C. 1341), the Mann Act (18 U. S. C. 2421), the Federal Kidnapping Act (18 U. S. C. 1201), and the Stolen Motor Vehicle Act (18 U. S. C. 2312), are all examples of crimes which have the same social purpose as various state crimes, but where the particular acts prohibited by the federal government are beyond the reach of state power. A further act must be committed by the defendant, *e. g.*, crossing a state border, before federal jurisdiction may be asserted.

4. Another group—and the one into which, as we show below, we think this case falls—contains those cases where the federal and state statutes may cover the same physical acts, but where the interests protected by the respective enactments are essentially different. In other words each government within its own sphere of authority is acting to protect a separate social interest by enacting statutes having different "gists" or "purposes."

That different interests of the state and federal government may be violated by the same act has long been recognized. In 1847, in *Fox* v. *Ohio,* 5 How. 410, this Court, in holding that a state may punish one who utters a false coin as a cheat, observed that the Ohio crime was distinct from the crime of counterfeiting punishable only by the federal government. The former, it observed "is a private wrong, by which the government may be remotely, if it will in any degree, be reached"; the latter, "an offence directly against the government, by which individuals may be affected" (5 How. at p. 433). And in *United States* v. *Marigold,* 9 How. 559, 569, in holding, conversely, that Congress could punish the passing of counterfeit, the Court noted that "the same act might, as to its character and tendencies, *and the consequences it involved,* constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each" (emphasis added). See also, *Ex parte Siebold,* 100 U. S. 371, 390; *Cross* v. *North Carolina,* 132 U. S. 131; *Pettibone* v. *United States,* 148 U. S. 197, 209; *Crossley* v. *California,* 168 U. S. 640; *Sexton* v. *California,* 189 U. S. 319; *Gilbert* v. *Minnesota,* 254 U. S. 325; *McKelvey* v. *United States,* 260 U. S. 353, 358–359; *Westfall* v. *United States,* 274 U. S. 256, 258.

There are numerous other illustrations of this category of cases where the federal and state interests in the prosecution of offenses arising from a single transaction are in their essential character different.

The classic statement is that in *United States* v. *Cruikshank*, 92 U. S. 542, 550–551:

> Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. * * *.

When the federal government prosecutes a fraud in an election in which federal officials are chosen, it is enforcing a federal interest even if the same acts violate a state interest in the integrity of state elections. *Ex parte Siebold*, 100 U. S. 371, 393.

In *Crossley* v. *California*, 168 U. S. 640, this Court held that, while the derailment of a train carrying the mails of the United States is a crime which may be punished by the federal government, the death of the engineer which resulted from the derailment is a crime against the laws of the state which could be punished by the state through an indictment for murder.

More recently, this Court has recognized that the same act of assault of a private individual by a state officer acting under color of law may simultaneously constitute a deprivation of the victim's federal rights and a common law crime punishable by the state. In *Screws* v. *United States*, 325 U. S. 91 (opinion of Mr. Justice Douglas) it was observed (*ibid.*, p. 108):

> The fact that it [the act upon which the federal offense is based] is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punish-

ment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses.

We think it is clear that, whatever may be said of the other three categories discussed above (*supra*, pp. 18–20), successive prosecutions under the fourth category cannot be said to be for the same offense, and therefore in violation of the prohibition against double jeopardy. Under the classic test of identity of offenses—that each involves an element not present in the other[6]—the offenses would be different since the federal interest involved in federal prosecution would not be the same as the state interest in the state prosecution. This Court has never held that all offenses committed in the course of a "single transaction" are one, regardless of the statutes violated and the injuries resulting therefrom. See *Gore* v. *United States*, No. 668, Oct. Term, 1957, decided June 30, 1958. See also, in addition to the cases cited in fn. 6, *supra*, *Bell* v. *United States*, 349 U. S. 81, 82–83 ("Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?"); *United States* v. *Universal C. I. T. Credit Corporation*, 344 U. S. 218. Even those who are critical of present modes of determining identity of offenses agree that offenses are separate where there are separable social interests sought to be protected. See,

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[6] *Pinkerton* v. *United States*, 328 U. S. 640, 644; *Blockburger* v. *United States*, 284 U. S. 299; *Gavieres* v. *United States*, 220 U. S. 338. See also *Hoag* v. *New Jersey*, 356 U. S. 464.

e. g., Gore v. *United States, supra* dissenting opinion of the Chief Justice; Kirchheimer, *The Act, The Offense and Double Jeopardy,* 58 Yale L. J. 513, 524 (1949).

As we show below, this case falls within the fourth category discussed above, because prosecution by the federal government was not for the same offense for which sentence was imposed by the state. There is thus no violation of the double jeopardy clause. Cf. *Hoag* v. *New Jersey,* 356 U. S. 464; *Gore* v. *United States, supra.*

B. *In this case, each indictment had as an essential substantive element a factor not present in the other, reflecting in each instance a peculiar and separate interest of the prosecuting sovereign.*

The Illinois indictment charged a conspiracy to injure the property and communication facilities of two private corporations—the Southern Bell Telephone and Telegraph Company and the American Telephone and Telegraph Company. It is based on an Illinois statute, pp. 3–4, *supra,* which reaches common law conspiracies or agreements to violate Illinois statutes. *People* v. *Dorman,* 347 Ill. App. 317, 106 N. E. 2d 842; *Maloney* v. *People,* 132 Ill. App. 184; 2 Moore, Ill. Crim. L. and Proc. (1932 Ed.), Sec. 971. Under Illinois law, where the crime charged is against private interests, the particular private interest affected must be alleged and proved. *People* v. *Livermore,* 390 Ill. 85, 95, 60 N. E. 2d 413, 417; and see *People* v. *Flaherty,* 396 Ill. 304, 310, 71 N. E. 2d 779, certiorari denied, 331 U. S. 856; *People* v. *Walker,*

7 Ill. 2d 158, 161, 130 N. E. 2d 182.[7] It is clear, therefore, that the social interest which Illinois sought to protect by its prosecution was in the sanctity of privately-owned property from conspiracies to cause its malicious destruction. The vindication of private property rights is a matter of peculiarly local interest, and, of course, under their police power the states may punish depredations to private property within their separate and exclusive sphere of operation and without interference from the federal government. Cf. *Kelly* v. *Washington,* 302 U. S. 1, 10; *California* v. *Zook,* 336 U. S. 725, 738; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 208–209; *Reid* v. *Colorado,* 187 U. S. 137, 150. The general nature of the state interest in protecting its citizens against unlawful conspiracies is indicated by the broad scope of the Illinois conspiracy statute, *supra,* pp. 3–4. The statute covers a multitude of subject matters, and, also in effect, codifies the common-law crime of conspiracy.

The federal indictment, on the other hand, alleges a conspiracy to commit an offense "against the United States." It charges a violation of 18 U. S. C. 1362, *supra,* p. 3, which punishes willful or malicious injury to "means of communication, operated or controlled by the United States," and malicious interference with the working or use of any such line. Thus, unlike *Bartkus* v. *Illinois,* No. 1, where both the federal and state prosecutions were instituted under

[7] Illinois has a separate statute, patterned on the federal conspiracy statute, punishing conspiracies to commit any "offense against," or "to defraud" the state, "in any manner, or for any purpose." Title 38, Section 140, Smith-Hurd Ill. Stat. Ann.

"robbery statutes,"[8] here the state proceeding was brought under the general power of the state to punish unlawful conspiracies while the federal government prosecuted for a conspiracy to violate a specific and narrow federal statute.

To establish the federal offense, it was essential to prove knowledge by the conspirators that the means of communication were operated and controlled by the United States. This was, in fact, a hotly contested issue at the trial and on appeal. Proof that the conspiracy was directed only to injury of property of the companies named in the Illinois indictment would not have established the federal offense or supported the allegations of the federal indictment.

The substantial nature of the federal interest protected is made clear by the history of 18 U. S. C. 1362. This provision derives from the Act of June 23, 1874, 18 Stat. 250, which punished the willful or malicious injury of telegraphic lines constructed, owned, occupied, or controlled by the United States. The Act which emanated from the House Committee on Military Affairs, together with other legislation dealing with problems arising out of the Civil War (2 Cong. Rec. (pt. 4) 3203; 2 Cong. Rec. (pt. 5) 4207), was designed as an anti-sabotage law to protect communication facilities used by the federal government which had not been adequately protected during the war crisis. The Act of 1874 was replaced by the Act of March 4, 1909 (35 Stat. 1099, 18 U. S. C. (1940 ed.) 116). The latter Act applied to the injury or

[8] We discuss *infra*, at pp. 32–33, other respects in which this case differs from *Bartkus* v. *Illinois*.

destruction of "any telegraph, telephone, or cable line, or system, operated or controlled by the United States", and thus reached new forms of government communication systems. S. Rep. 10, pt. 1, 60th Cong., 1st Sess., p. 16. During the Senate debate on this provision, its sponsor explained that it would be applicable only to federally operated or controlled communication systems.[9]

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[9] The following portion of the debate on the bill which was ultimately passed as the 1909 Act underscores this point (42 Cong. Rec. 857):

Mr. SUTHERLAND: Recurring for a moment to section 62, which has been passed over, and replying to the question asked by the Senator from New Jersey [Mr. Kean], the old law provided that "any person or persons who shall willfully or maliciously injure or destroy any of the works or property or material of any telegraphic line," and so on. The Senator from Idaho explained that the section had been broadened to include new appliances. The Senator from New Jersey desired to know whether it was broad enough to apply to wireless telegraphy. I answer him yes. The committee thinks the word "system" inserted in the new section covers wireless telegraphy.

Mr. HEYBURN: It says "cable line or system."

Mr. SUTHERLAND: Yes; so as to include cable and telephone and wireless systems. The word "line" in the original law would not include such apparatus.

Mr. KEAN: Yes; but wireless telegraphy does not use a cable.

Mr. HEYBURN: It is a system.

Mr. SUTHERLAND: It is a system.

Mr. HEYBURN: The word "system" is used to cover it.

Mr. SUTHERLAND: It is not a telegraphic line; it is a telegraphic system.

Mr. CULBERSON: Mr. President——

The VICE-PRESIDENT: Does the Senator from Utah yield to the Senator from Texas?

Mr. SUTHERLAND: Yes.

[cont.]

18 U. S. C. 1362 is a revision of the 1909 Act and broadens its provisions to include all "systems" of communication "operated or controlled by the United States." The section reaches only those offenses against property in which the federal government has a possessory or proprietary interest, and does not apply to offenses involving the destruction or injury of facilities owned, operated or controlled by private individuals which are left to the protection of the state. The "unit of prosecution" (*Bell* v. *United States*, 349 U. S. 81, 83) under 18 U. S. C. 1362 is a federally controlled or operated communication facility—the unit of the state offense is private property. The federal government could not, and did not, purport to prosecute the offense set forth in the state indictment and the state could not, and did not, purport to prosecute the offense set forth in the federal indictment.

Mr. CULBERSON: I was not in the Chamber when the Senator from New Jersey made his statement in reference to section 62, and I may be asking a question which he has already answered; but I should like for the Senator from Utah to explain why it is that the words "or system" have been inserted at these three several places in this section.

Mr. SUTHERLAND: For precisely the same purpose—because the original law covered only a telegraph line, and not a telegraph system. Since this law was originally adopted we have had the invention of wireless telegraphy, which is not a line, but a telegraph system; and it is quite as necessary, the committee think, to protect the apparatus of a wireless telegraph system as it is to protect the apparatus and works of a telegraphic line.

Mr. BACON: The section applies only to lines or systems owned or controlled by the United States.

Mr. SUTHERLAND: Yes.

Mr. BACON: It has no reference to other lines.

Mr. SUTHERLAND: It has reference to no others. It says "operated or controlled by the United States."

The state and federal crimes underlying the conspiracies charged relate to different subject matters lying within the particular province of each enforcement authority. The offenses are therefore distinct and are not "the same offence" within the meaning of the Fifth Amendment prohibition against double jeopardy. Cf. *Pettibone* v. *United States, supra* (148 U. S. at pp. 209–210).

The particular facts of this case emphasize the undesirable results that would flow from permitting a state prosecution to preclude federal enforcement of federal law protecting a federal interest. Here, the state returned an indictment, to which petitioners pleaded guilty, charging conspiracy to injure private property. The conspiracy related to property of private companies which was physically situated, not in Illinois, but in Mississippi. It was in Mississippi that the damage to the federally-controlled lines occurred.[10] However adequate Illinois may have regarded the three-month sentence imposed upon petitioners for the conspiracy to injure private property, it is not the measure of the right of the federal government to punish conspiracy to injure federally controlled property in Mississippi, or of the interest of the federal government in protecting its facilities and systems. If the rule were otherwise, so that a state conviction would preclude federal prosecution even though the state was less concerned with the par-

[10] Illinois law punishes "the act of conspiring to do certain wrongful acts, without regard to where such wrongful acts are to be done." *People* v. *Buckminster*, 282 Ill. 177, 181, 118 N. E. 497, 499.

ticular violation of its laws, or had interests different from those of the federal government, the fear expressed in *United States* v. *Lanza* (260 U. S. at p. 385) of the "race of offenders" to state courts might well be realized.[11]

The states do not normally enforce national policies through their own legislation. And the enforcement of federal laws, particularly those which relate to national defense and security, as here, should not be made to depend on the vagaries of state law which differ in respect to the "criteria of substantive offenses" and the procedures for their enforcement. Cf. *Pennsylvania* v. *Nelson, supra,* 350 U. S. at p. 509. This case is one where the state and federal laws are directed against diverse consequences or separate injuries arising out of a common series of acts or a common transaction. The basis of the state offense was a conspiracy in the State of Illinois to injure private property—the basis of the federal offense, a conspiracy entered into in the State of Mississippi to destroy and interfere with the use of property controlled and operated by the federal government. Even if it be assumed that each conspiracy contemplated a

[11] "If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts" (260 U. S. at p. 385).

common act or series of acts to effectuate its plan, the federal government could act independently to enforce federal law protecting federally controlled property.

II

IN ANY EVENT, A PRIOR STATE PROSECUTION CANNOT PRECLUDE FEDERAL ENFORCEMENT OF FEDERAL LAW

A. *The question of what effect a prior state conviction has on the right of the federal government to prosecute is reached in this case only if the crimes and the interests protected by both sovereigns are found to be identical.*

Petitioner here, like the petitioner in *Bartkus* v. *Illinois,* 355 U. S. 281, presently before this Court on reargument (No. 1), seeks to have this Court reconsider its holding in *United States* v. *Lanza,* 260 U. S. 377. For the reasons discussed in Point I of this brief, we think these arguments are largely inapposite to this case. As we have shown, they are based on the erroneous premise that the state and federal prosecutions here were, as in *Lanza,* for crimes defined in the same manner by both sovereignties, in furtherance of the same social policy. The common-law precedents cited by Professor Grant, upon which petitioner relies, relate to the same offense, usually murder, as to which one sovereign had extra-territorial jurisdiction; they do not cover different offenses arising out of the same act. See J. A. C. Grant, *The Lanza Rule of Successive Prosecutions,* 32 Col. L. Rev. 1309–1331; J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons,* 4 U. C. L. A. L. Rev.

1–37. Professor Grant himself has noted that where "crimes are sufficiently distinct to warrant successive prosecutions by the same government, there can be no objection to the nation's punishing one after the state has punished the other. See 32 Col. L. Rev. at p. 1310, n. 8.

For the same reasons, this case is distinguishable from the *Bartkus* case. There, the Court has before it a state conviction for robbery *after* an acquittal in a federal court of robbery of the same bank, federal insurance of the bank's funds being the basis of federal jurisidction. The petitioner's argument there is based on the premise that the interests protected by the state and federal laws are the same, and that, aside from the allegation of federal jurisdiction, the crime is defined in the same manner. Petitioner in *Bartkus* recognizes (Br. in No. 39, Oct. T., 1957, p. 15) that "if the offenses have different policies, the state trial (*e. g.*, for murder) would not bar a federal trial (*e. g.*, for deprivation of civil rights)." Petitioner in *Bartkus* also agrees that "By selling liquor to a minor on Sunday it may be that by one act a man may commit two offenses for purposes of double jeopardy" (*Ibid.*, p. 33). See the dissenting opinion of the Chief Justice in *Gore* v. *United States, supra.* We have shown in Point I that, by destroying private property and interfering in the use and working of a federal communications system, a man may similarly commit two offenses.[12] Certainly his conduct is such that each

[12] With respect to the problem of two conspiracies, each made criminal by specific statutes and having separate unlawful objectives, see *American Tobacco Co.* v. *United States*, 328 U. S. 781, 788.

sovereign whose separate interest has been violated may act to enforce its laws.

Other factors also distinguish this case from *Bartkus*. We do not attach critical significance to the fact that there the second prosecution followed an acquittal, whereas here the later prosecution followed a conviction, so that there could be no claim here that, despite the difference in parties, principles of *res judicata* and collateral estoppel are involved.[13] What is significant is that petitioner in *Bartkus* argues that federal supremacy barred state prosecution after a federal acquittal. Here, federal supremacy would preclude the state conviction from being a bar to federal enforcement of federal law. For that reason, we agree that questions of federal supremacy are relevant

[13] Unlike *Bartkus* (Br. in No. 39, Oct. T., 1957, pp. 61–63), petitioner herein does not rely upon the Seventh Amendment to the Constitution which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Since there was here no prior jury trial, the Seventh Amendment has no applicability. Moreover, this Amendment was clearly designed to cover civil trials (compare its language with that of the Sixth Amendment) between the same parties. One cannot assume that the same rule must have been intended in criminal trials where the parties to the litigation (the prosecuting sovereigns) are different. The concept of *res judicata* is embodied in the Seventh Amendment. But when the parties are different, relitigation of the same issue, even in civil litigation, would be in accordance with the rules of the common law. Therefore, even if the Seventh Amendment were applicable to criminal trials, the accused would have to establish an identity of parties and of the issues being examined before *res judicata* could be invoked to preclude a second trial. But if this could be shown, the Fifth Amendment would itself bar the second trial. In short, the Seventh Amendment does not alter the basic issues now before the Court.

in this area of the law but, as we show below, they here operate to sustain the federal conviction.

As we have stated, neither the basic issue of double jeopardy posed by *Lanza*, nor the issues of federal supremacy, need be reached in this case if we are correct in our contention (argued in Point I, *supra*) that the crimes defined by the state and federal governments in the statutes here involved are different. To reach those issues in this case one must hypothesize (1) a valid federal law protecting the identical interests as those sought to be protected by the state and (2) that, despite this identity of interests, federal law has not preempted the field. Because the federal law here in question is an anti-sabotage statute designed to protect federal communications systems against malicious destruction and/or interference and delay or obstruction of message transmission, it may well be that, if the state sought to protect the identical interest, problems of double jeopardy would be obviated by a finding that the federal act had occupied the field. *Pennsylvania* v. *Nelson,* 350 U. S. 497. But assuming that this has not occurred here, we submit that it follows as a postulate of a federal system, that, if the federal law sets forth a policy which properly lies within the sphere of federal interests, enforcement of that policy may not be frustrated because the state (or the defendants) have won the "race" to obtain the first judgment in a state court. We submit that a state, by obtaining the first judgment, cannot prevent the federal government from enforcing, as the federal government sees fit, a valid federal policy (unless, as it has sometimes done [see *infra,* p. 36],

Congress should so provide). To that ultimate proposition we now turn.

B. *The federal government should properly be free to enforce federal law regardless of state action.*

United States v. *Lanza,* 260 U. S. 377, has been the law since December 1922. It was decided by a unanimous Court, in an opinion by the then Chief Justice which rested on earlier statements and rulings. Although it has been criticized in academic and some judicial circles, *Lanza* has not been overruled or modified by this Court. See *Jerome* v. *United States,* 318 U. S. 101, 105; *Screws* v. *United States,* 325 U. S. 91, 108, fn. 10. Its holding is that, regardless of the nature of the differences, if any, between the state and federal interests sought to be protected, no state prosecution can preclude the federal government from enforcing federal law. The Fifth Amendment, the Court noted, applied only to proceedings by the federal government (citing *Barron* v. *Baltimore,* 7 Pet. 243)[13a] and "the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority". 260 U. S. at 382.

The proposition that the state and federal government may each define its own policies in relation to its self-protection was considered an essential attribute of federal government and the constitutional principle of distribution of powers. The successive prosecutions of state and federal prohibition offenses

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[13a] See *Palko* v. *Connecticut,* 302 U. S. 319; *Adamson* v. *California,* 332 U. S. 46; *Knapp* v. *Schweitzer,* No. 189, Oct. Term, 1957, decided June 30, 1958.

involved in *Lanza,* and in *Hebert* v. *Louisiana,* 272 U. S. 312, were justified on the basis that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (260 U. S. at p. 382.) In respect to the prohibition laws, both the federal government and the states had policies of law enforcement which paralleled each other, yet the offense described by each was an expression of the policy of each in respect to its own constitutional authority which each government enforced for itself. The Court wrote (260 U. S. at p. 382):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

The Court pointed out that Congress could, if it saw fit, bar prosecution by the federal courts for any act which had been punished by the state.[14] It noted, 260 U. S. at p. 385:

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[14] Where Congress has intended that a prior state conviction or acquittal should preclude federal prosecution "for the same act or acts", it has so provided. See 18 U. S. C. 659 (em-

> If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. * * *

In our federal system of government, the state and federal government may each separately determine its own policies of law enforcement. As the opinion of this Court in *Feldman* v. *United States*, 322 U. S. 487, 490–491, states:

> The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommo-

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[fn. 14 continued]
bezzlement or theft of baggage in interstate of foreign commerce), 18 U. S. C. 660 (embezzlement of funds of interstate carriers), 18 U. S. C. 1992 (wrecking of trains), and 18 U. S. C. 2117 (breaking into an interstate carrier with intent to steal therein). See Note, 55 Columbia L. R. 83, 93, fn. 60.

The contention advanced by petitioner (Br. 21) that this Court should, in the exercise of its supervisory powers, bar a federal trial after a state proceeding is without merit. As the Court states in *Lanza*, this is a matter for Congress not the judiciary and, as we note *supra*, Congress has on occasion specifically legislated on this question. The situation here is entirely unlike that in *Rea* v. *United States*, 350 U. S. 214, where "[a] federal agent ha[d] violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U. S. 821 *et seq.* The power of the federal courts extends to policing those requirements and making certain that they are observed." 350 U. S. at p. 217. If, as we submit, the action of the federal officials in trying petitioner for the federal offense violated no constitutional mandate, there would be no rule or reason which would provide a basis for upsetting this conviction.

> dations to it may be. The matter was put in classic terms in what Chief Justice Taft called "the great judgment," *Ponzi* v. *Fessenden,* 258 U. S. 254, 261, of Chief Justice Taney in *Ableman* v. *Booth,* 21 How. 506, 516: "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."

And see *Jack* v. *Kansas,* 199 U. S. 372, 379–380; *Logan* v. *United States,* 144 U. S. 263; *Knapp* v. *Schweitzer,* No. 189, Oct. Term, 1957, decided June 30, 1958.[15]

Even where the social interest protected by the federal and state governments is the same, the offenses as defined by the different legislatures may be and frequently are different. As Judge Ervin observed in *United States* v. *Bostow,* 273 Fed. 535, 538 (S. D. Ala.):

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[15] In the *Knapp* case, its latest pronouncement with respect to the impact of federalism on criminal prosecutions, the Court said:

"This Court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments. * * *"

What meaning shall be given the words "the same offense"? How shall they be construed? If the Congress can pass legislation to enforce the Prohibition Amendment, and the states may also do so, it is manifest that such legislative acts will differ—that different laws will be provided for the enforcement of the amendment, and different punishments will be imposed. It is also manifest that often the same act or transaction will violate both the federal and state provisions, so the question arises: Where the same act violates both statutes, has there been only one or more offenses committed? It will be conceded that the offender cannot be tried in the federal court for violation of the state statute, nor in the state court for the violation of the federal statute; so it appears that the offense is not the act or transaction alone, but that the act or transaction must be considered in the light of the legislative provisions and prohibitions.

In the absence of such legislative prohibitions, the act or transaction committed would not be an offense. It is not the prohibited act, but the terms of the statute, which declares and defines the offense. It seems to me, therefore, that as each legislative entity, whether state or federal, declares its own offense, this cannot be the same offense as that provided by the other, though the same act or transaction may violate each of them, but that there are as many offenses as the legislative provisions may declare.

To the extent that the interests are separately defined and separately punished, it cannot be said that the

policies of one sovereign are effectively enforced by the other.

In this connection, in the banking field where, as the petitioner in *Bartkus* contends, federal and state interests are closely allied, if not identical, two decisions of this Court are worth noting. In *Cross* v. *North Carolina,* 132 U. S. 131, this Court held that the fact that Congress made the crime of making false entries concerning a promissory note on the books of a national bank with intent to deceive a government examiner an offense against the United States, did not preempt the power of the state to prosecute the crime of forging the same note payable to the national bank, regardless of the fact that each offense might arise out of the same transaction. In meeting the contention of the plaintiffs in error that the forgery charged was (132 U. S. at p. 137) "an integral, essential element in such entries [proscribed by R. S. 5418], which were false only because based upon the forged notes," the Court said (*ibid.* pp. 139–140):

> The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offence equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. * * * If it were competent for Congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any

such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority, which the States have always exercised, of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a State because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. If the punishment by the State of the crime of forgery, of which the defendants were found guilty, leaves them exposed to punishment by the United States for having made false entries upon the books of the bank of which they were officers, with the intent to deceive the agent appointed by the general government to examine its affairs, it results from the fact that they are amenable to the laws of the United States, as well as of the State of North Carolina, and may be subjected to punishment for violating the laws of each government. The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the State, charged with the duty of protecting its own citizens, from punishing the forgery as, in itself, a distinct, separate offence committed within its limits and against its laws.

See also *Westfall* v. *United States*, 274 U. S. 256, 258, where the Court, through Justice Holmes, said:

> * * * The argument is that Congress has no power to punish offences against the property

rights of State banks. It is said that the statute is so broad that it covers such offences when they could not result in any loss to the Federal Reserve Banks, and it is suggested that if upheld the Act will invalidate similar statutes of the States. This argument is well answered by *Hiatt* v. *United States,* 4 F. (2d) 374, 377. Certiorari denied. 268 U. S. 704. Of course an act may be criminal under the laws of both jurisdictions. *United States* v. *Lanza,* 260 U. S. 377, 382. And if a state bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement. That there is such a System and that the Reserve Banks are interested in the solvency and financial condition of the members also is too obvious to require a repetition of the careful analysis presented by the Solicitor General. The only suggestion that may deserve a word is that the statute applies indifferently whether there is a loss to the Reserve Banks or not. But every fraud like the one before us weakens the member bank and therefore weakens the System. * * *

It has been suggested (brief for petitioner in *Bartkus,* No. 39, Oct. T., 1957, p. 15) that there need be no great concern over the race to the state courts because "if the first trial is a mock trial, it is not jeopardy at all under established principles." Cited for this proposition, the abstract validity of which we do not dispute, are various dicta and treatises.

Professor Grant similarly states that "Of course a collusive or fraudulent proceeding, even though in the courts of the same government, has never been accepted as a bar to a subsequent prosecution." 4 U. C. L. A. L. Rev. 1, 3, fn. 6. But as a practical matter this exception to the principles of double jeopardy, were that doctrine otherwise applicable, would supply little real assurance that federal policies could not intentionally be thwarted by invocation of state proceedings. The problems of proving a suit to be collusive are very great, and would in most instances be insurmountable. In the cases cited by Professor Grant, *e. g., Commonwealth* v. *Alderman,* 4 Mass. 477 (1808); *State* v. *Cole,* 48 Mo. 70 (1871), proof that the prior proceeding was a sham was easily adduced since in those cases the defendant, after assaulting the victim, informed against himself before a justice of the peace and paid a nominal fine. The courts had no difficulty in holding that this self-invoked proceeding before the justice of the peace did not preclude a later prosecution initiated by the state or the victim. But in most "collusive suits" one may expect the participants to show greater sophistication. If the prosecution is in form initiated by the state's prosecutor, it would generally be impossible to establish the collusiveness of the state suit.[16] Surely, the

[16] See *State* v. *Little,* 1 N. H. 257, 259, where, in holding that a proceeding before a Justice of the Peace initiated by an agent of the defendant did not preclude a subsequent prosecution, the court wrote:

> But when prosecutions before the higher courts, are managed by the attorney general, the solicitor or counsel appointed by the judges: and before single magistrates,

federal court should not be called upon to inquire whether the sentence, if any, imposed by the state court was adequate to indicate that the suit was bona fide. Even a serious offender in a genuinely adversary proceeding may be given a suspended sentence if the judge believes he will reform. Nor would inquiry into the extent of cooperation between the defendant and the state's prosecuting officers enhance harmonious federal-state relations. However valid in theory the concept that a mock trial does not constitute jeopardy may be, we submit that it does not provide an answer in those areas where, unfortunately, conflicts may exist between state and federal policy, or where particular federal laws may be locally unpopular (as was Prohibition). See *United States* v. *Barnhart*, 22 Fed. 285, 292 (D. Ore. 1884):

> And again, it must be born in mind that the policy of the state and the United States may be, and sometimes is, at variance on a given subject. In such case, the former may indirectly hinder or defeat the policy of the latter, if a trial in its courts for a crime growing out of an act which also constitutes a crime against the United States can be used as a bar to a prosecution of the offender in the national courts. For instance, the United States, under the fifteenth amendment, may punish any one who discriminates against the exercise of the elective franchise by another on account of color. *U. S.* v. *Reese*, 92 U. S. 217. But if

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by similar counsel, or by the party aggrieved, or by disinterested individuals, such prosecutions can never perhaps be considered fraudulent * * * An offender however, can possess no implied authority to conduct a prosecution against himself * * *.

> the state may also declare such an act a crime, it may purposely affix a mere nominal punishment thereto, and thus give any one guilty of such an act an opportunity to seek refuge in its tribunals before the United States can reach him, and by a trial and acquittal therein, at the hands of a sympathizing jury, or the imposition of a mere nominal punishment, effectually prevent the United States from prosecuting the offender in its own courts, and inflicting such punishment upon him as may be necessary to vindicate its authority and maintain its policy in the premises.

Federal laws passed by Congress to enforce federal policy are properly enforced by federal courts, regardless of state law and state enforcement policy. If Congress wishes to defer to state enforcement it can, and, as noted *supra,* p. 36, sometimes has done so. But that is for Congress to decide. Under our system of government, a state should not be able to preclude the federal government from enforcing federal law.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgments appealed from should be affirmed.

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